

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

CENTER FOR THE DISABLED

and

Cases

3-CA-23742

3-CA-23856

**UNION OF NEEDLETRADES, INDUSTRIAL
AND TEXTILE EMPLOYEES, AFL-CIO**

**CENTER FOR THE DISABLED
Employer**

and

Case

3-RC-11255

**UNION OF NEEDLETRADES, INDUSTRIAL
AND TEXTILE EMPLOYEES, AFL-CIO
Petitioner**

Alfred Norek, Esq., Counsel for the General Counsel.

Brent Garren, Esq., Counsel for the Charging Party/Petitioner.

Richard Landau, Esq., *Jackson Lewis, LLP*, Counsel for the Respondent/Employer.

**DECISION
Statement of the Case**

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in Albany, New York on March 11, 13 and 17, 2003. On January 15, 2003, an amended consolidated complaint issued based upon unfair labor practice charges and first and second amended charges filed by Union of Needletrades, Industrial and Textile Employees, AFL-CIO (union or Petitioner or Charging Party) on between July 30, 2002¹ and December 2, 2002, against Center for the Disabled (employer or Respondent). Numerous violations of Section 8(a)(1) of the Act are alleged, including allegations of interrogation, impliedly and explicitly directing employees to revoke their union authorization cards, creating the impression of surveillance of employees' union activities, soliciting grievances from employees and impliedly and explicitly promising to redress those grievances in order to dissuade employees from supporting the union, impliedly and explicitly informing employees that selection of the union would not result in improvements in their terms and conditions of employment and could result in their not receiving future wage increases, threatening to cease honoring employee medical restrictions in the event employees engaged in union activities, and impliedly and explicitly informing employees that it would not engage in good faith bargaining in the event that they selected the union as their collective bargaining representative. In addition, the complaint alleges that Respondent maintained overly broad confidentiality rules that prohibited employees from discussing salary, benefits and other terms and conditions of employment information, in violation of Section 8(a)(1). Finally, it is alleged that Respondent violated Section 8(a)(1) of the Act by denying employee Betty Yarbrough's request to be assisted by another employee during an investigatory interview, and by then suspending and disciplining her because she invoked her right to be represented. Respondent denies all of these allegations.

¹ All dates are in 2002 unless otherwise indicated.

On September 5, the union filed a petition seeking to represent certain employees of Respondent. An election was conducted by mail ballot from October 25 to November 13. The ballots were counted on November 14, and it was determined that the number of challenged ballots was sufficient to affect the results of the election. Both the Petitioner and the employer filed timely objections to conduct affecting the results of the election. On January 27, 2003, the Acting Regional Director, Region 3 issued an order directing a hearing on the challenged ballots, on the employer's objections, and on Petitioner's objections 2, 3, 5, 7, 8, 9, 10, and 14. The Regional Director further ordered that the representation matters be consolidated with the unfair labor practice cases.

On March 6, 2003, the parties entered into a stipulation regarding some of the challenged ballots, and those ballots were opened and counted on March 10, 2003. The final tally of ballots was 349 votes cast in favor of Petitioner and 389 votes against Petitioner. The total number of eligible voters was 1058. The remaining challenged ballots were not sufficient to affect the results of the election. The employer withdrew its objections.

Findings of Fact

I. Jurisdiction

Respondent admits, and I find, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization Status

Respondent admits, and I find, the union is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Respondent's business operation and supervisory hierarchy

Respondent is engaged in providing educational and vocational services, and in the operation of group homes, for developmentally disabled adults and children in New York State. Respondent admits, and I find, the following individuals are supervisors within the meaning of Section 2(11) of the Act:

James Hamil	Executive Director, St. Margaret's facility
Christopher Mulroy	Program Manager, Surfwood Drive facility
Megan Fields	Assistant Director of Nursing, St. Margaret's facility
Karen Macri	Deputy Executive Director, Educational Services
Aaron Howland	Director of Residential Services
Vicki Looby	Program Administrator, Bradford House facility
Barbara Myers	Director of Program Operations, Smith Center facility

	Jeff Covington	Director of Residential Services
5	John Barbuto	Program Administrator, Congress Street facility
	Tawana Payton	Program Manager, Congress Street facility
	Dale Ann Brown	Program Administrator, Union Street facility
10	Laureen Sager	RN Unit Manager, St. Margaret's facility
	Tanzania (Taz) McLeod	Program Manager, Bradford Street facility
	Scot Wildeberger	Program Manager, Respite Services facility
15	Kathleen Pierce	Assistant Principal, Albany School
	Linda Rodecker	Program Manager, Union Street facility
20	Mary Grace Pietrocola	Director of Social Services, St. Margaret's facility

B. The organizing campaign

25 There was no specific testimony as to when the union's organizing campaign began. The earliest indication in the record as to the start of the union's organizing efforts is very early in June. Former employee Jack Medford testified he was called to a meeting of employees on June 3 and during the course of that meeting, Kathleen Pierce discussed the fact that the union had begun leafleting at Respondent's premises.

30 C. Employee Conduct Rules

1. Facts

35 Respondent distributes orientation materials to new employees. In the section entitled "Personnel Information" the following language appears:

40 Salary, benefit and other personnel information relating to employees will be treated as confidential. Personnel files, payroll information, disciplinary matters and similar information will be maintained in a manner designed to ensure confidentiality in accordance with applicable laws. Employees will exercise due care and will release or share information only with those persons who have need for such information or in accordance with applicable law.

45 Since January 1, 2002, Respondent has maintained an employee handbook. In the section entitled "Confidentiality/Access and Release of Information," the following language appears on page 4:

50 The Center recognizes that those it serves trust that all information regarding their personal circumstances, medical history and treatments and financial situations will be held in the strictest confidence. Employees, therefore, are prohibited from divulging

information regarding consumers,² other employees or Center matters, other than on a 'need to know' basis.

5 The Human Resources Department of the CFD reserves the right to provide information where it determines that failure to provide information may expose the agency to potential liability.

In that same handbook, on page 6, in the section entitled "Rules of Conduct" the following language appears:

10 The Center expects employees to follow rules of conduct that will protect the interests and safety of employees, consumer and the organization. Following are examples (not intended to be all-inclusive) of infractions of the rules of conduct that may result in disciplinary action, up to and including termination of
15 employment: ... disclosure of confidential Center information to unauthorized parties..."

20 Marsha Miles was employed by Respondent as a resident counselor/ housekeeper at the Surfwood facility from May 2001 to October 30. Miles testified that in July, Mulroy approached her and Carl White, the assistant manager, and told them that they would each be receiving a 6 percent pay increase. According to Miles, Mulroy said that Respondent had found extra money and resident counselors were going to get a 6 percent increase rather than the usual 3 percent increase. Mulroy then told Miles and White "don't tell anyone, don't talk about it."

25 Mulroy testified that in July he attended a meeting with his superiors, Will Gilchrest and Jennifer Louprett, during the course of which wage increases were discussed. Gilchrest told Mulroy he could begin telling employees about the raises. When Mulroy got to the Surfwood facility, Miles and White were the only two employees present. He told them that the usual
30 annual wage increase of 3 percent was going to be given, plus an additional stipend, the amount of which would be dependent on each employee's background, how long the employee had worked in the field, and similar factors. About an hour later, Louprett called Mulroy and told him that he could not tell employees about the additional stipend and that the additional money had been put on hold for the time being. At Louprett's direction, Mulroy went back and spoke to
35 Miles and White and told them that the additional increase was not going to happen and they should not talk about it. Carl White, Will Gilchrest, and Jennifer Louprett did not testify.

40 Jack Medford was employed by Respondent as a teaching assistant in the Langan School from December 2001 to December 2002. At the time of the hearing, Medford was employed by the union. Medford testified that shortly after the union filed the petition on September 9, Macri conducted a meeting at the Langan School that he and about five other employees attended. According to Medford, Macri told the employees that privacy was an issue, that pay was confidential, and that discussing pay infringed on privacy.

45 Macri testified that wage increases were given in July and it was around that time (not in September) that she discussed pay confidentiality with employees. She explained that all employees got a cost of living increase, but only some employees received an equity adjustment. Macri recalled telling employees at a meeting how equity adjustments were

50 ² Respondent refers to the developmentally disabled adults and children whom it serves as consumers.

awarded. She then said that if an employee had a concern, the employee could speak with her. She could show each employee how his or her wages compared to other employees with comparable education or years of experience. She told employees she could only tell each of them his or her individual salary, however, and she could not divulge other employees' salaries.
 5 Macri denied telling employees they could not discuss salaries amongst themselves.

Roxanne Joy was hired in September 2001 as a residential counselor in the Cohoes facility. Joy testified that during her new employee orientation, a woman conducting the session said that the employer would prefer if employees did not discuss salaries or working conditions with other employees. Joy asked how someone could tell her that she could not discuss her rate of pay with someone else because Joy felt this was her personal business. The woman repeated the agency would prefer that employees not engage in the discussion. A few months later, in the latter part of 2001, Joy asked her house manager, whom she only knew by the name Gail, why employees were not allowed to discuss topics such as salary. Gail responded,
 10 "Well, nobody can stop you from doing it, but I would not recommend you do it." Gail added that going against the rules could lead to termination of employment.
 15

2. Analysis

The discussion of wages and other terms and conditions of employment is part of organizational activity and an employer may not prohibit employees from discussing these matters, or from attempting to determine the working conditions of other employees. *Mediaone of Greater Florida, Inc.*, 340 NLRB No. 39, slip op. at 3 (2003). In determining whether an employee conduct rule violates the Act, the rule should be read as a whole in order to determine
 20 whether employees would reasonably read the rule as prohibiting discussion of wages and working conditions among employees or with a union. In addition, the extent to which the rule is enforced against employees for engaging in such activity, whether the rule is promulgated in response to union or protected activity, and the exhibition of antiunion animus are factors to be considered in determining the lawfulness of such a rule. *Id.*
 25

The rule in Respondent's orientation materials restricting employees from releasing or sharing information concerning salary, benefits, payroll information, and disciplinary matters is unlawful. The rule declares that Respondent considers these matters to be confidential. Given that that Respondent simultaneously maintains a rule warning that disclosure of confidential
 30 information is grounds for termination, employees could reasonably believe that the discussion of these matters with other employees, or with a union, could be grounds for discipline. Contrary to Respondent's argument, I am not persuaded that the language allowing employees to discuss these matters with persons on a need to know basis saves the rule. There is a difference between the right to discuss wages and terms and conditions of employment, which
 35 is guaranteed by Section 7 of the Act, and the "need to know", a term that is not defined either by the Act or by Respondent, and one that could reasonably be interpreted by an employee as circumscribing Section 7 rights. Nor am I persuaded that the term "in accordance with applicable law" saves the otherwise unlawful rule. An employer cannot state that wages and benefits are confidential information, the disclosure of which could subject an employee to discipline up to
 40 and including termination, and then expect to negate the unlawfulness of that statement by reminding employees that they enjoy the protection of the law.
 45

The confidentiality rule contained in the 2002 handbook is also unlawful. The rule prohibits employees from discussing the "financial situations" of other employees except with
 50 those persons with a "need to know." This prohibition could reasonably be interpreted as restricting employees' Section 7 right to discuss employee wages and benefits with other employees and with a union.

Evidence was adduced of three instances when Respondent allegedly enforced these rules and prohibited employees from discussing wages. Regarding the statements attributed to Macri by Medford, I discredit Medford's testimony and find no credible basis for this allegation. It is not disputed that Respondent gave annual raises to employees every July. Macri's testimony that she discussed pay raises with employees in July is therefore far more logical than Medford's claim that she discussed this subject with employees in September. Medford was an employee of the Charging Party at the time of his testimony and the motive for his claiming that Macri's comments were made in September, after the filing of the petition and during the critical period, is apparent. I credit Macri's testimony that she told employees in July that she would not reveal individual salaries to other employees. She did not say employees could not discuss the subject of salaries among themselves, or with anyone else. I find that Macri's statements were permissible.

Regarding the testimony of Roxanne Joy, there is no basis upon which Respondent may be held responsible for the statements of unidentified individuals. Joy testified that an unidentified woman made statements at her employee orientation session, and that a house manager by the name of Gail made similar statements to her. Neither of these individuals are alleged to be agents of Respondent, nor is there evidence sufficient in the record to establish their agency status.

The credible evidence does establish one instance when Respondent's confidentiality rules were enforced against an employee in the context of discussing wage increases. Mulroy admitted in his testimony that in July he told Miles that some employees were going to be awarded wage increases over and above the normal three percent raise given to all employees. He further admitted that at the direction of his superior, he later told Miles that the additional raise was being put on hold for the time being and that Miles was not to discuss the anticipated raise with other employees.

The confidentiality rules maintained in Respondent's orientation materials and in its 2002 handbook are unlawful on their face. In addition, there is credible evidence of one instance when Respondent enforced these rules in the context of prohibiting employees from discussing wage increases. These rules therefore violated Section 8(a)(1) of the Act.

D. The Suspension of Yarbrough

1. Facts

Betty Yarbrough has been employed by Respondent as a resident counselor at Respondent's Union Street facility since February 2001. Her immediate supervisors are Dale Ann Brown and Linda Rodecker. On or about September 19, Brown issued two disciplinary letters to Yarbrough. The first was for several medication errors Yarbrough had made, and the second was for her failing to sit with her assigned consumers during mealtimes. Both letters warned Yarbrough that similar acts in the future would result in further disciplinary measures up to and including termination.

On October 31, Yarbrough worked her regular shift from 2:00 p.m. to 11:00 p.m. At about 6:00 p.m. Rodecker told her that an employee scheduled to work the late shift was not able to come in and since Yarbrough was the designated replacement, she would have to stay and work the late night shift. Yarbrough told Rodecker that she didn't think that she could do it. Rodecker attempted to find somebody else to work, but was unable to do so, and Yarbrough worked from 11:00 p.m. to 9:00 a.m. During the course of the late night shift, Yarbrough crossed

her name off the work schedule for her regular day shift on November 1. At about 8:30 a.m. on November 1, Brown approached Yarbrough and asked if she had taken her name off the work schedule for her regular shift that day. Yarbrough said that she had. Brown said that she was not supposed to do that, and that Yarbrough had to work her regular shift that day. Yarbrough
5 said that if she went home and went to sleep, she would not be able to wake up in time to report for her shift. Brown told her to come in at 5:00 p.m. instead of 2:00 p.m. Yarbrough stood up with her arms folded and Brown said, "You look pissed off, like you want to spit in my face." Yarbrough responded, "I wouldn't do that. I'm not like that." Yarbrough finished the late night shift at 9:00 a.m. on the morning of November 1.

10 Yarbrough returned to work at 5:00 p.m. on the afternoon of November 1 for her shortened regular shift. After she clocked in Brown approached her and said, "We need to talk." When she asked why, Brown did not respond. Yarbrough asked if she could have a co-worker come with her, and Brown said that Rodecker would be there. Yarbrough said she wanted a co-
15 worker to go with her and Brown asked, "Are you refusing to speak with me?" Yarbrough answered no, but repeated that she wanted a co-worker to come with her. Brown said she was sending Yarbrough home, that she should not return to work until she was called, and that she would be called on Monday. Yarbrough did not work her regular shift that day or the next day, November 2. Her next scheduled workday was Tuesday, November 5.

20 On Monday, November 4, Brown called Yarbrough and told her to report for her regular shift the following day, which she did. Upon her return to work on November 5, Yarbrough was summoned to a meeting with Brown and Rodecker, and a coworker was present. Brown asked if Yarbrough objected to participating in the meeting and Yarbrough said no. Brown spoke about
25 the need to restore discipline in the facility.

On November 6, Brown issued a letter to Yarbrough that stated in relevant part:

30 On the evening of 11/1/02, you arrived for your scheduled shift and upon my request to discuss the above concerns with you, you repeatedly refused to meet with Linda and myself to resolve these concerns. Due to your refusal to meet with us, and your lack of professionalism in front of the consumers and staff, you were asked to leave the residence until further notice.

35 During our meeting, it was conveyed to you that these type of incidents cannot occur any longer in front of consumers and staff. Linda and I conveyed to you that you need to improve in the areas of professionalism, being respectful, and discussing concerns in front of the consumers and staff. You were advised that any future incidents in these areas will result in termination of your employment. I look forward to the resolution of this
40 matter.

45 During her testimony, Yarbrough was asked why she told Brown that she wanted to have a co-worker present with her on November 1. She explained, "Because at that point I feared that I was going to be fired. Because of her attitude that day, and all the letters I had gotten already. And, I thought that was going to be the last straw." Brown and Rodecker did not testify.

2. Analysis

50 Section 7 creates the statutory right of an employee to refuse to submit to an interview that the employee reasonably fears may result in discipline without union representation. *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). The right arises only in situations where the employee

requests representation, and is limited to situations where the employee reasonably believes the investigation will result in disciplinary action. If an employer has reached a final, binding decision to impose certain discipline on the employee prior to the interview, based on facts and evidence previously obtained, no Section 7 right to union representation exists under *Weingarten* when the employer meets with the employee simply to inform him of, or impose, that previously determined discipline. *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979). The exercise of *Weingarten* rights does not interfere with legitimate employer prerogatives. The employer has no obligation to justify a refusal to allow union representation. The employer is also free to carry on the inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by a representative, or having no interview and forgoing any benefits that might be derived from one. In *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 679 (2000), enfd. in relevant part, 268 F.3d 1095 (D.C. Cir 2001), cert denied, 536 U.S. 904 (2002), the Board extended *Weingarten* rights to employees not represented by a union.

Applying these principles, I find that Yarbrough had a reasonable belief that Brown intended to conduct an investigatory interview with her on November 1. Yarbrough had received two disciplinary letters in September, and she had removed her name from the work schedule without permission on November 1. When Brown said to Yarbrough on the evening of November 1, "we have to talk" Yarbrough did not know whether or not a final, binding determination had been made to discipline her. She feared she might be fired, and she was concerned that the meeting with Brown "was going to be the last straw." Yarbrough thus invoked her Section 7 right to have a co-worker present, and Brown invoked Respondent's prerogative not to conduct the meeting.

In paragraphs VIII and X of the complaint, counsel for the General Counsel alleges that Brown denied Yarbrough's request to be represented by another employee during an investigatory interview and then conducted the disciplinary interview in the absence of that employee representative. These allegations are without merit inasmuch as no investigatory interview took place on November 1. After Yarbrough invoked her *Weingarten* right to have an employee present, Brown did not have the meeting. Both Yarbrough and Brown were within their rights: Yarbrough had the right to request the presence of an employee representative, and Brown had the right to refuse to conduct the disciplinary interview in the presence of an employee representative. I therefore recommend these allegations be dismissed.

Respondent did however violate Section 8(a)(1) of the Act by sending Yarbrough home on November 1 and suspending her until November 5, as alleged in paragraphs IX and X of the complaint. Yarbrough's credible and uncontradicted testimony establishes that she was suspended immediately upon her invocation of her *Weingarten* right. Respondent further violated Section 8(a)(1) on November 6 by issuing to Yarbrough a written discipline which expressly cited her protected refusal to meet with Brown and Rodecker on November 1 as a reason for the discipline.

E. No-Solicitation Rule

1. Facts

Medford testified that on June 5, Pierce approached him in a hallway of the Langan School and asked him to come into her office. No one else was present when they spoke. According to Medford, Pierce told him that there was a policy that employees were not supposed to talk about the union while at work. Medford asked what she meant, and she said there was a no-solicitation rule prohibiting discussions about the union. Medford asked if

5 someone asked him a question during lunch, could he talk about the union, and Pierce responded "No, not on Center property at all." She suggested employees could talk about the union off premises, at the local Dunkin' Donuts. Medford testified that prior to this meeting, there was constant interaction among employees during work time, i.e. conversations about families, sports, lunch plans, and general gossip. In addition, employees regularly solicited other employees to buy Tupperware, books, and church raffle tickets. Following this meeting, Medford repeated what Pierce had told him to five different employees. On cross examination, Medford was confronted with his pre-trial affidavit in which he stated that Pierce had approached him one day and asked him to come see her when he had time, and it was not until several days later that he spoke with her in her office.

10
15 Macri testified that in June, two employees complained to her that Medford was talking to them about the union and urging them to attend a union meeting during classes (work time) and in the presence of the children. The employees told Macri they felt pressured and uncomfortable in the situation. Macri told Pierce to tell Medford not to discuss these issues in front of the children in the classrooms.

20 Pierce testified that she was told by Macri that employees had complained about Medford talking to them about the union during work time and in the presence of students. Pierce saw Medford and asked him to come to her office, which he did. Pierce testified she told Medford he should refrain from speaking to other employees during their work time or his work time or in consumer care areas. Medford asked if he could respond to a question about the union if one was posed to him by another employee. Pierce told Medford that he certainly could respond as long as it was in a non-consumer care area or during break times. Pierce did mention the possibility of talking about the union in the local Dunkin' Donuts, but denied stating that the Dunkin' Donuts was the only place employees could talk about the union.

25
30 Macri and Pierce testified that both before and after the June 5 conversation with Medford, they observed employees, including Medford, frequently talking about the union in the hallways and in the break room. These conversations took place before and after work and during break times. No employee was ever disciplined for engaging in these conversations.

2. Analysis

35 In this instance, I found both Macri and Pierce to be more credible than Medford. Medford was inconsistent in his recollection of the circumstances that led up to this conversation, and his claim that he was broadly prohibited from talking about the union anywhere on the employer's property is not believable. Respondent maintains a written no-solicitation rule, the legality of which is not challenged, and Pierce's instructions to Medford were consistent with a lawful no-solicitation policy. Further, there is ample evidence in this record of employees talking about the union on company property. Medford himself testified that in the days following his conversation with Pierce, he talked with five other employees about what Pierce had told him, and he did not say that he held those conversations off premises. Marsha Miles, a witness for the General Counsel and the Charging Party, testified to a series of conversations about the union that she participated in on company property. For all of these reasons, I discredit Medford's testimony and recommend dismissal of paragraph VI(a) of the complaint.

50

F. Alleged 8(a)(1) Conduct

1. Testimony of Marsha Miles

5 In a memo dated June 25, Respondent advised employees that if they wished to revoke previously signed authorization cards, they could do so. Respondent attached a sample letter that employees could send to the union. A copy of the memo and the sample letter were placed in all employees' mailboxes. Miles testified that in early August, she was doing work in the office of the Surfwood facility and Mulroy asked if she had signed a union card and she said no. 10 Mulroy said if she signed a card and wanted to get it back, she could fill out a piece of paper. Later that same month, Miles was present in the kitchen of the Surfwood facility with another employee, Judy Parkhurst. Mulroy asked both women if they had signed cards for the union. Miles said no and Parkhurst said yes. Mulroy said if they wanted to get the cards back, all they had to do was fill out a paper and send it to the Labor Board. In a third conversation during that 15 same month of August, Miles and Parkhurst were together on the back porch of the Surfwood facility. According to Miles, Mulroy again asked both women if they had signed cards. This time Miles said she had signed a card. Again Mulroy said she could get the card back if she wanted. Mulroy asked Miles why she didn't tell him she had signed a card when he originally had asked her and Miles said she was fearful of repercussions. Parkhurst did not testify.

20 Miles further testified that in late August or early September, she observed Mulroy in the office with resident counselor Felicia Washington. She heard Mulroy ask Washington if she had signed a union card. Washington said she had signed a card, Mulroy said Washington could ask for her card to be returned, and he gave her paperwork to do that. Washington did not testify. 25 Following this conversation with Washington, Mulroy called resident counselor Burt George into the office and asked him if he had signed a card. George said he had not signed a card. Mulroy told George if he wanted to get his card back, all he had to do was fill out the paperwork. George did not testify.

30 Mulroy testified that on one occasion in August, he walked into the kitchen and overheard Miles, Parkhurst and Washington talking about the union. Miles and Parkhurst were speaking in favor of the union and he heard Washington say that she had signed a card but was not sure if it was the right thing to do. He testified: "At that point I let her know that there was a memo put out stating if you wanted to get your card back after you had signed it, then this is the 35 way to do it." He did not give Washington a copy of the memo because he knew it had previously been left in all of the employees' mailboxes at the facility. Mulroy denied having individual conversations with Miles, Parkhurst, Washington or George about authorization cards. He did, however, testify that he discussed authorization cards during the monthly staff meetings. At these meetings, which Dale Ann Brown attended on a regular basis and which Jeff Covington and Will Gilchrest attended from time to time, the June 25 memo was discussed and the 40 process by which employees could revoke their signed authorization cards was reviewed.

I credit Mulroy over Miles for several reasons. As discussed above, Mulroy admitted that he told Miles that she should not discuss a potential wage increase with other employees, 45 conduct which I have determined to be unlawful. Admissions such as this add to a witness's credibility in other situations. In addition, Miles testified that when Mulroy first asked her if she signed a card for the union, she said no. It would have been illogical at that point for Mulroy to instruct Miles on how to revoke an authorization card, and her claim that he gave her that instruction is not believable. Finally, neither Parkhurst, nor Washington, nor George testified to 50 any conversation with Mulroy about card revocation. For these reasons, I credit the testimony of Mulroy over Miles.

Based upon the credible testimony of Mulroy, I find that he did not engage in unlawful conduct in August. He did not interrogate employees about whether they signed a card for the union or about any other union activity. Nor did he direct employees to revoke their union authorization cards. In response to overhearing an employee say that she was not sure if she had done the right thing in signing a card, Mulroy merely reminded her of the June 25 memo that had been previously been distributed. I therefore recommend the allegations in complaint paragraphs VI(c) and VI(d) relating to Chris Mulroy be dismissed.

2. Testimony of Janet McVeigh

Janet McVeigh has been employed as a charge nurse at the St. Margaret facility since January. Her 17-year old son was employed at the same facility and both employees were eligible voters. The son left the Respondent's employ in December.

McVeigh testified that in mid-July, Hamil approached her in the hallway of the facility and asked if he could speak with her. According to McVeigh, Hamil asked if her son had signed an authorization card and she said that he had. Hamil then asked her if she had gotten the paper that had been distributed to employees instructing them on how to revoke a signed authorization card and she said she had not. McVeigh testified that later that day Hamil gave her a copy of the June 25 memo and sample letter and told her that if her son wanted to revoke his card, he should read the document and sign it. A day or two later, Hamil approached her again and asked if her son had signed the paper to revoke his card, and she said no, that her son was proud to sign a union card and he would not sign the revocation.

Hamil testified that in mid-July, he was walking through the facility, as was his usual practice. McVeigh approached him and appeared upset and angry. She said that her son had signed an authorization card the prior weekend and "that she had a concern about both his age and the fact that he did not need to join the union." She asked Hamil if it "was okay age-wise" for her son to sign a card and what could be done to get it back. Hamil told her that it was his understanding that her son could sign a card at his age, but if he wanted to get it back, there was a previously distributed memo to employees on the revocation of cards, and he would have somebody from the Human Resources Department get back to her with the information. Hamil testified he notified Human Resources about the situation and took no further action. About a week later, as he was again walking through the facility, McVeigh approached him, said she had received the information she wanted, and thanked him. That was the extent of the conversation and he never asked her if her son had revoked the card.

In September of October, McVeigh told Hamil she had gotten a subpoena to testify and that she did not want to appear. She asked what she could do and Hamil said he would contact Human Resources. In late December or early January 2003, McVeigh told Hamil she had gotten a second subpoena, that she was being contacted by union representatives at her home, and that she was sick of the union business. Hamil testified that McVeigh was upset, agitated, and appeared intimidated. Again Hamil said he would have someone from Human Resources contact her. On March 7, 2003, four days before the opening of the hearing, McVeigh left a voice mail for Hamil in which she stated that she had been served with a third subpoena and she did not want to testify. She again said that union representatives had called her house at 11:00 p.m. and she repeated that she was sick of the union business. She wanted to know what to do. Hamil consulted Human Resources and called McVeigh back. He told her that she had to comply with the subpoena. Hamil responded, "I do not know what they're bothering me for. They are not going to be happy with what they hear." McVeigh did not testify about the subject of trial subpoenas.

Hamil was an entirely believable witness. His candid and straightforward demeanor on the witness stand leads me to conclude that he was testifying from his honest recollection. McVeigh, in contrast, was far less believable. According to McVeigh, Hamil initiated three separate conversations with her about whether her son had signed a card, but never once
 5 asked her if she had signed a card. This strikes me as highly improbable. I therefore credit Hamil's testimony over McVeigh, and recommend that the allegations contained in complaint paragraph VI(c) relating to Hamil be dismissed.

No evidence was adduced relating to the complaint allegation that in mid-July Hamil
 10 created the impression of surveillance of employees' union activities. I therefore recommend paragraph VI(b)(2) of the complaint be dismissed.

3. Testimony of Sean Kum

Sean Kum has been employed by Respondent as an overnight counselor at the
 15 Surfwood facility since 1995. Kum testified that in July, Brown called him into the office at the Surfwood facility. No one else was present. She asked Kum, "how can we help change, how can we help better changes [sic] for the employees...is it hours, wages, better scheduling?"
 20 Kum was caught off guard and surprised. Before he could respond, Brown continued by saying the union represented employees at Montgomery ARC, had never succeeded in getting a contract or a raise for those employees, and that the union would not get any more money for Respondent's employees. Kum testified he had never spoken to Brown prior to this
 conversation, and never spoke to her again. He had never previously been asked by anyone from management about proposing changes in working conditions. Brown did not testify.

In *Traction Wholesale Center, Inc.*, 328 NLRB 1058, enfd. 216 F.3d 92 (D.C. Cir. 2000),
 the Board stated that, absent evidence that an employer has previously solicited and resolved
 25 employee grievances, when an employer undertakes to solicit employee grievances during an organizational campaign, a compelling inference may be drawn that the employer is implicitly promising to correct the grievances and thereby influence employees to vote against union
 30 representation. Brown's credible and uncontradicted testimony is that Brown summoned him into the office, solicited him to describe changes in working conditions that employees would like to see made, and implicitly promised to make those changes. Kum had never spoken with Brown prior to this conversation, and had never been previously asked his views about working
 35 conditions by any other member of management. I therefore find that by soliciting grievances from Kum, Brown violated Section 8(a)(1) of the Act.

I further find that Brown's statement that the union would not succeed in getting
 40 employees higher wages constituted a threat that supporting the union would be futile. As such, the statement violated Section 8(a)(1) of the Act. *EPI Construction*, 336 NLRB No. 16, n. 17 (2001).

4. Testimony of Christal Powell

Christal Powell has been employed by Respondent as a childcare technician at the St.
 45 Margaret facility since 1988. Because she is a diabetic, Respondent has honored certain restrictions on her work hours. Powell is always assigned to the day shift because she is not supposed to drive at night, and for 14 years, her regular shift has been 7:00 a.m. to 3:00 p.m. She is not required to work overtime. Powell lives in Schenectady and drives 45 minutes to work
 50 each way. Sager and Pietrocola are her supervisors and Powell is good friends with both women.

On October 16, Powell arrived at the facility between 6:30 a.m. and 6:40 a.m. Together with a union representative, she distributed union leaflets to employees arriving for work. It was dark outside when she left home and when she arrived at the facility. She leafleted for about ten to fifteen minutes, then clocked in and began work at 7:00 a.m. Powell testified that later that day, Sager approached her in the hallway and said that someone had told her that Powell had "showed up real early" that morning, at about 6:20 a.m. Powell responded that was not true. Sager told Powell she should be careful or her medical restriction would be used against her. Powell further testified that she was scheduled to come to work at 6:00 a.m. the next day in order to accompany a resident to the Albany Medical Center. On the afternoon of October 16, she went to Sager and asked what the difference would be between coming to work at 6:00 a.m. to take a resident to the medical center and coming to work at the same time to leaflet for the union. Sager said that when Powell came in an hour early to take a resident to the medical center she left work an hour early and so she would not work more than the agreed upon number of hours.

Powell testified that on November 15 she was approached in the cafeteria by Pietrocola. Pietrocola said Hamil had told her he was going after employees with bogus medical restrictions because other employees were complaining about it. She said if Powell could be out there leafleting, that Hamil was going to check into it. Pietrocola said that Hamil did not mention Powell by name when he spoke to her, but that Pietrocola knew it was Powell to whom Hamil was referring. She told Powell to be careful.

Sager testified that she and Powell have been friends for five years and she is aware of Powell's medical restrictions. When she reported for work on October 16, several employees told her that they had seen Powell leafleting for the union at about 6:15 a.m. and they asked Sager what was going on. Sager approached Powell and told her what the employees had said. Powell became upset, said employees were out to get her, and asked Sager which employees had spoken with her. Sager refused to reveal the names. Sager said that employees were concerned about her and that she too was concerned about her because she had been driving in the dark that morning. Powell became even more upset and Sager asked her what was wrong and that she was asking her not as her supervisor but as her friend. Powell repeated that people were out to get her and that she did not want to talk any further. The conversation ended. A few minutes later, Powell entered Sager's office and said she didn't know what was going on, that "she was second guessing herself. She was so involved with this union." Sager told her that she didn't have to vote for the union if she felt that way and Powell said that she didn't want to talk about it anymore and walked out of the office. The next day, Powell again approached her and said, "I'm sorry for what happened yesterday." Sager denied ever telling Powell to be careful or that her medical restrictions were in jeopardy.

On cross examination, Sager acknowledged that upon learning of Powell's arrival to work in the dark on the morning of October 16, she was concerned about the "credibility of [Powell's] restrictions...because when someone has a restriction it causes the other staff members to stay for extra hours. It causes other staff to get angry at the person who has the restrictions." Sager then testified, "If you are there at 6:15 leafleting, but then you say that you cannot stay at night, I have trouble seeing the difference there." Sager did not recall any conversation with Powell about coming in to work at 6:00 a.m. on October 17. She testified Powell was never required to come to work at 6:00 a.m. and that if she did report that early, it was at her own request.

Pietrocola testified that on the evening of November 15, she and Powell were talking on the telephone about their respective medical conditions; Pietrocola had just completed chemotherapy and was undergoing radiation treatments. She told Powell that Hamil was taking

5 a look at the work restriction policy and she told Powell to make sure she had a doctor's note or whatever else was needed for her medical restrictions. Pietrocola did not mention Powell having leafleted on October 16. On cross examination, Pietrocola testified that several weeks before this telephone conversation with Powell, Hamil told her he was going to be reviewing the work restriction policy. He said that a number of employees had work restrictions for reasons that were bogus. He did not mention any employee by name and made no reference to any employee having leafleted for the union.

10 This allegation vividly illustrates the unfortunate situation where a union organizing campaign materially alters friendships in the workplace. Powell had been friendly with both Sager and Pietrocola for a number of years. When the union campaign began, Powell sided with the union and Sager and Pietrocola, as supervisors, sided with Respondent. In observing these three witnesses testify, it was very clear that they all felt badly about the effect the campaign had upon their respective friendship. Pietrocola became emotional when she described how a week before the hearing, Powell had sent her a letter declaring they were no longer friends. These situations present very difficult credibility issues, and none of the three witnesses was clearly more credible than the others. However, considering all of the circumstances, and the demeanor of the witnesses, where there is a conflict in the testimony, I credit Powell's version over the versions given by Sager and Pietrocola.

20 I credit Powell's testimony that it takes her 45 minutes to drive to work each day, and that for 14 years her regular shift started at 7:00 a.m. It is clear, therefore, that at least in the winter months, Powell drives to work in the dark. I further credit Powell's testimony that from time to time she comes to work at 6:00 a.m. Whether she does this on a volunteer basis or is required to work the earlier hours is irrelevant. The fact is that she often drives to work in the morning in the dark and her medical restrictions were never challenged on this basis. It was not until she drove to work in the dark in order to leaflet that she was warned that her medical restrictions might be in jeopardy. Sager admitted on cross examination that the "credibility of [Powell's] restrictions" was called into question by her driving to work in the dark in order to leaflet. Given this admission, I find Powell's testimony that Sager warned her on October 16 that her medical restrictions could be in jeopardy to be credible. I also credit Powell's testimony that on November 15, Pietrocola warned her to be careful because Hamil was going to be looking into "bogus" medical restrictions and that in Pietrocola's opinion, Hamil was talking about Powell.

35 Respondent argues that even if these statements were made, they did not violate the Act because of the friendship between Powell and Sager and Powell and Pietrocola. I disagree, as the law is clear that statements made by supervisors to employees who are also friends may nevertheless violate the Act. In *Taylor Wharton Division Harco Corporation*, 336 NLRB 157 at fn.5 (2001), the Board stated that a statement by a supervisor, even if only a word to the wise from a friend, is as likely to interfere with an employee's freedom of choice as an outright threat from a hostile supervisor. In *NLRB v. Big Three Industrial Gas & Equipment Co.*, 579 F.2d 304, 311 (5th Cir. 1978), cert denied 440 U.S. 960 (1979), the Court stated:

45 [W]e emphasize that social relationships in themselves are not a sufficient basis to lift acts of illegal interference from the scope of the Company's responsibility. Friends can unlawfully threaten their friends. Indeed, warnings of Company retaliation cast as friendly advice from a familiar associate might be more credible, hence more offensive to Section 8(a)(1) than generalized utterances by distant Company officials.

50 Applying these principles, I find that despite the friendship that existed between Powell and Sager and Powell and Pietrocola, Sager and Pietrocola's statements to Powell on October

16 and November 15 constituted threats of reprisal because Powell had engaged in union activity, and therefore violated Section 8(a)(1) of the Act.

5. Testimony of Jeremy Lopuch

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Jeremy Lopuch was hired on September 16 to work in the Smith Center facility. He was disciplined on October 24 for sleeping on the job, disciplined again on October 31 for calling in late to say he would not be at work, and he was terminated in November for refusing to work with certain consumers. During his testimony, Lopuch claimed to be an eligible voter.

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Lopuch testified that on his first day of employment, he saw some people in the parking lot as he entered the facility. He asked Myers, his supervisor, who the people were and Myers said that they were people trying to bring in the union. According to Lopuch, Myers added, "but don't worry, they can't get you anything."

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Myers testified that she could not recollect any such conversation with Lopuch. She explained that there would be no reason for her to have made any such statement for the following reasons. First, Myers had interviewed Lopuch and in the course of that interview, she told him the union was organizing. Lopuch therefore was well aware of the nature of the union activity on his first day of work. Second, Myers testified that she knew not to claim that a union could not do anything for employees. She explained:

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I knew that saying that the union cannot do anything for you was unlawful. I knew that I spoke to many people about the negotiating process. Within the negotiating process I talked about how that the union cannot make promises to you without negotiating with the agency. So, if that is what I knew. I would explain to them that one side; there would be a union representative on one side. The agency would be on the other side. The union may throw out this. The agency may throw out this. They have to agree upon it.

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I do not credit Lopuch's testimony. During a two-month period of employment, Lopuch was disciplined twice and then fired for misconduct. Lopuch testified that he was certain he was eligible to vote in the election, yet the parties agreed that he was not eligible to vote. I therefore find Lopuch's testimony neither credible nor reliable. Myers, on the other hand, was an intelligent, well-spoken witness and one who was simply believable. She articulated logical reasons why she would not have made the statement attributed to her by Lopuch, reasons which I found persuasive. I therefore recommend dismissal of those allegations in complaint paragraph VI(e) relating to Myers.

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6. Testimony of William Smith

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William Smith has been employed by Respondent for fifteen years as a one-on-one aide at the Langan School. Smith testified that in that mid-September he was called to a meeting in the auditorium of the facility with about seven other employees. At this meeting, Macri spoke against the union. After the meeting concluded, she asked Smith to stay. The two of them were alone in the auditorium, and she asked him how he felt about the union. He said he had not yet made up his mind, but that he was leaning toward the union because of a situation that occurred between him and Pierce two months previously. Smith said he had asked Pierce for information about raises two months previously but Pierce had never gotten back to him. Macri responded by saying that she and Smith had a good record together and that Smith could come to her about any problem. Smith said he did talk about his problems, but no one ever did anything about them. Smith testified that two days after this conversation with Macri, Pierce approached him and said she had the information he had requested in July. Pierce did not, however, ever

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actually give Smith the information.

5 Macri testified that she held dozens of formal meetings with employees to discuss union issues. During the course of one of those meetings, in mid-September, Smith made statements about a lack of communication and she got the impression that he felt he was being treated unfairly. She asked him to stay after the meeting to talk, and asked him if he felt he was being treated unfairly. Smith responded that he was not being treated unfairly by the current administration. Macri said she was not concerned about past administrations, but asked if he felt like he had been treated unfairly by the current administration. Smith responded that sometimes they did not communicate as best they could. Macri asked him what he meant, and he gave as an example that he had asked Pierce for information about equity pay adjustments, and she had never gotten back to him. Macri told Smith that Pierce would get back to him in a few days with the information. Smith volunteered that he was not necessarily in favor of the union. Macri told him to stop, that she found that difficult to believe but that she did not want to ask him about that. Smith said OK. Macri denied asking Smith about his union sentiments and testified there was no reason to pose the question because she already knew his sentiments. Smith had openly expressed his support of the union at prior meetings, and shortly before this mid-September meeting, Macri had seen his signature on a letter in which Smith declared himself a member of the union organizing committee.

20 Following her conversation with Smith, Macri spoke to Pierce and told her to get back to Smith with the requested information within the next week. Pierce testified she gathered the information and told Smith he should come to her office and she would be happy to discuss it with him, but he never did.

25 I found Macri and Pierce accounts to be more credible than Smith's account. Smith initially claimed that he did not become an open supporter of the union until after this mid-September conversation with Macri. He later admitted, however, that he was openly supportive of the union at the time the petition was filed on September 5. In fact, he admitted attending a pro-union rally the day the petition was filed and the rally was covered on the local television news. That Smith was openly supportive of the union prior to this conversation lends credibility to Macri's claim that she had no reason to inquire of Smith's union sympathies because they were already well known. I recommend that the allegations in complaint paragraph VI(d) relating to Macri be dismissed.

35 I further find the credible evidence does not establish that Pierce solicited grievances from Smith in order to dissuade him from supporting the union. As a follow-up to comments volunteered by Smith during the meeting, Macri asked Smith if he felt he was being treated unfairly. It was Smith who said he had requested information about pay increases and never received it. Macri did no more than tell Pierce to provide Smith with the previously requested information, and Pierce told Smith the information was available. I therefore recommend that the allegations in complaint paragraph VI(b)(1) relating to Macri and Pierce be dismissed.

45 7. Testimony of Kym Hayes

45 Kym Hayes has been employed by Respondent as a CNA at the St. Margaret facility since 1998. Hayes testified that in September, she was on the floor working when Fields approached and asked her how she felt about unions. Hayes responded she was in favor of unions and had been represented by a union at a previous job. At the time of this conversation, Hayes had not openly taken a position for or against the union's interest in representing Respondent's employees. Hayes further testified that on other dates in the month of September, at around the time she was questioned by Fields, she observed Fields ask the same question of

approximately five other employees while they were working on the floor. She did not hear anything else Fields said to these employees or what they said to Fields.

5 Fields is the assistant director of nursing and she supervises 100 employees. Fields testified that in about September, she was distributing flyers about the upcoming election to employees at the facility. When she offered one to Hayes, Hayes she said she did not want it because she knew about unions. Fields denied asking Hayes or any other employee how they felt about unions.

10 I found Hayes to be more credible than Fields. Her recollection appeared sharper and she more direct and straightforward. She was not given to exaggeration. For example, she did not claim that she spoke to any other employees about Fields' questioning of employees, testimony that would have favored the Charging Party. Fields, in contrast, exhibited a reticent demeanor, her testimony was vague at times, and she was less convincing. I therefore credit
15 Hayes that in September, Fields questioned Hayes and five other employees how they felt about unions.

The applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality of the circumstances test adopted by the Board in
20 *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider various factors, including those set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e. is there a history of employer hostility and discrimination; (2) the nature of the information sought, i.e. did the interrogator
25 appear to be seeking information on which to base taking action against individual employees? (3) the identity of the questioner, i.e. how high was he in the company hierarchy; (4) the place and method of interrogation, i.e. was the employee called from work to the boss's office and was there an atmosphere of "unnatural formality"?; and (5) the truthfulness of the reply, i.e. is there evidence that the interrogation actually inspired fear. The *Bourne* criteria should not be
30 mechanically applied and are not prerequisites to a finding of coercive questioning. Rather, they are useful indicia that serve as a starting point for assessing the totality of the circumstances. In the final analysis, the task is to determine whether, under all the circumstances, the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Heath
35 Care Center*, 330 NLRB 935, 940 (2000) and cases cited. Applying these principles, I find the questioning of employees by Fields did not rise to the level of coercive interrogation. There is no evidence to suggest that Fields was asking these questions in preparation for taking adverse action against the employees based upon their responses. The questions were asked on the work floor and none of the employees was summoned into an office. Hayes testified that she
40 readily acknowledged that she was in favor of unions because of a past positive experience, and thus Hayes was not in any way fearful of recrimination for responding truthfully. Significantly, with respect to Fields' questioning of the other employees, there is no evidence as to what if any statements may have preceded the questioning, and there is no evidence of how those employees responded to the questioning. It cannot therefore be determined if the
45 questioning of the other employees was coercive in all the circumstances. For these reasons, I conclude the evidence fails to establish that Fields' questioning of employees rose to the level of coercive interrogation, and I recommend dismissal of the allegations in complaint paragraph VI(d) relating to Fields.

50 8. Testimony of Amir Mahuoub

Amir Mahuoub has been employed at the Congress Street facility as a support counselor

since July 2001. On October 24, he attended a meeting at the facility with seven other employees. Supervisors Barbuto and Payton were present. At the time of this meeting, Payton had been a the program manager at the facility for about a month. Mahuoub testified employees were handed a paper listing several work-related topics for discussion. Barbuto and Payton then
5 left the employees and went upstairs. The employees discussed the issues and when Payton and Barbuto returned they all discussed the issue of fair treatment of the employees. Mahuoub brought up the issue of overtime and said it was not fairly distributed. Payton asked why he hadn't previously spoken to her about it, and he said that it had been a problem for a long time. She said she had only been the manager for a short time. Following the meeting, Mahuoub was
10 given ten hours of overtime work.

Barbuto testified that as a matter of routine, every six weeks he conducts mandatory staff meetings at the Congress Street facility. These meetings are always related to clinical matters. On October 24, the topic of the meeting was to discuss the relationship between
15 consulting clinicians and the direct care staff, and to discuss how clinical decisions are made. The meeting started at 9:00 a.m. and lasted for three hours. There was no discussion of the union at this meeting.

Barbuto testified that in addition to the meetings he conducts every six weeks,
20 employees at the facility also attend weekly meetings. The focus of the weekly meetings alternates: one week the meeting is about clinical matters, and the alternating week the meeting is to discuss staff issues. Barbuto testified that at every staff meeting employees are asked if anything is going on. Following the October 24 clinical meeting, Payton conducted the regular staff meeting. Scheduling, outings, therapy sessions, performance write-ups, and overtime were
25 discussed. Barbuto left after about 20 minutes. Following the meeting, Payton told Barbuto that Mahuoub complained that overtime should have been divided more fairly in the previous several weeks. Payton told Barbuto that she gave Mahuoub a couple of overtime shifts. Payton did not testify.

30 According to Barbuto, overtime is assigned in accordance with a complex formula and from time to time problems arise. Overtime complaints have arisen in the past, and each time they have occurred, the managers have tried to rectify the problem.

I find the evidence insufficient to establish that either Payton or Barbuto solicited
35 grievances from employees at the October 24 staff meeting. It is clear from Barbuto's testimony that two separate meetings were conducted that day, the three-hour clinical meeting followed by the regular staff meeting. Barbuto's credible and uncontradicted testimony is that employees are always invited at the beginning of staff meetings to talk about any concerns they might have. Mahuoub introduced the subject overtime and complained that it was not being fairly distributed.
40 There is no evidence that Payton's assignment of additional overtime shifts in response to Mahuoub's complaint was improper. Presumably, Mahuoub complaint had merit and, consistent with Respondent's past practice of rectifying employee complaints about overtime, Payton gave Mahuoub several overtime shifts. I therefore recommend dismissal of those allegations in complaint paragraph VI(b)(1) relating to Barbuto and Payton.
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9. Testimony of Betty Yarbrough

Yarbrough was one of 29 employees who signed an undated letter addressed to all
50 employees advising them of the union's organizing efforts and declaring themselves members of the organizing committee. Yarbrough testified that in mid-July, Rodecker and Brown asked her to come to their office in the basement of the Union Street facility. Brown told her that they had seen the letter and were shocked to see her name on it. She then asked Yarbrough if there

was anything they could do for her. Yarbrough said no. Neither Brown nor Rodecker testified.

Yarbrough's testimony was credible and not contradicted. I therefore conclude that by expressing her displeasure at seeing Yarbrough's name on the letter, and by then immediately asking Yarbrough if there was anything management could do for her, Brown solicited and implicitly promised to redress any grievances Yarbrough might have. Brown's conduct violated Section 8(a)(1) of the Act and I so find.

10. Testimony of Janette Morris

Janette Morris has been employed by Respondent since December 2000 as a direct-care aide at the State Street facility. She is supervised by Wildeberger and Covington. On October 11 there was a mandatory meeting of employees at the facility that six or seven employees attended. According to Morris, under the predecessor manager to Wildeberger, mandatory meetings had been held on the first Monday of every month, but that since Wildeberger had become manager, meetings were much more infrequent. Morris testified the last mandatory meeting held at the facility prior to the October 11 meeting was a year and a half before.

Morris testified that Wildeberger began the October 11 meeting by asking if anyone had any problems, issues or complaints that they wanted to bring up. One employee replied that new employees needed to be reminded that both adults and children had to be cared for and Wildeberger said he would address that situation. Another employee said they should have regular mandatory meetings like they used to, and Wildeberger said he would look into it. Covington then took over the meeting and handed out leaflets dealing with the union. One of the leaflets contained the pay scales of individuals who worked for the union. According to Morris, Covington said, "If the union came in that we would not have a contract."

At the time of the hearing, Wildeberger had been program manager for two years. He testified that he conducts mandatory employee meetings once a month or once every other month. The mandatory meeting immediately prior to the meeting on October 11 had been held in September. Wildeberger stated that he begins every meeting with an introduction of the topics to be discussed and he gives employees the opportunity to raise issues and ask questions. Consistent with that practice, on October 11 he gave employees the opportunity to raise any issues they had. He recalled an employee stating that they needed to have more staff meetings and Wildeberger responded that he would look into it.

Covington testified that on October 11, Wildeberger conducted the regular staff meeting, and he followed with a talk about the union. He referred to a 4-½ page, single-spaced, typed outline as a guide for his remarks. He talked about the give and take of contract negotiations. He said there was a possibility the union would ask for certain things and the employer would ask for certain things, and the negotiations would go back and forth. Covington denied stating if the union came in employees would not get a contract. He did say that the union had organized two other employers, Westchester UCP and the Richmond Center, and had not succeeded in getting a contract at those locations. He said negotiations could take an indeterminate amount of time. He urged the employees to vote no. Morris spoke up and said it was illegal for him to say that. Covington said he certainly could urge people to vote no and asked Morris what made her think it was illegal for him to say that. Morris did not respond.

I found Wildeberger more credible than Morris. It is not logical that Wildeberger would conduct mandatory staff meetings once every 18 months as testified to by Morris. I credit Wildeberger's testimony that he held mandatory meetings as frequently as once a month or

once every other month, and that he routinely used the generic opening of asking employees if they had any questions or subjects they wanted to discuss. He used the same opening during the October 11 meeting, and one employee responded that she would like to have more meetings. According to both Morris and Wildeberger, Wildeberger's only response was that he would look into it. Wildeberger's conduct on October 11 was consistent with his past practice of holding regular employee meetings and his conduct did not violate the Act. I therefore recommend dismissal of those allegations in complaint paragraph VI(b)(1) relating to Wildeberger.

I also found Covington more credible than Morris. Morris testified that Covington made the statement that if the union came in employees would not get a contract. It is highly improbable that Covington would have made such a blanket threat. His entire presentation was about collective bargaining negotiations and he relied on an outline that contained 24 separate bullet points on that topic. I credit Covington's testimony that he never made the threat attributed to him by Morris. I therefore recommend dismissal of those allegations in complaint paragraph VI(e)(2) relating to Covington.

11. Testimony of Stephanie Gibson

Stephanie Gibson was employed by Respondent from 1999 to 2003 as a residential counselor. In September, she was employed at the Bradford House facility. Gibson testified that in mid-September, she was called into the office by Taz McLeod. Aaron Howland and Vicki Looby were also present, and Howland did most of the talking. He said that the employees should not have the union as their representative because it was an industrial union. Gibson stopped him and said she was in favor of the union. Howland continued:

So, he had told me that if ever the Center has a raise and we [were] still at the bargaining table with the Center and UNITE, that we, the people who voted for it, UNITE, we will not be able to get a raise because we do not have contract. The contract would take years. If it takes years, then we would not [be] able to get a raise from the Center.

According to Gibson, Howland also said that if the union won and the employer received an across the board cost of living raise from New York State, the employees probably would not receive the increase because they would not have a contract.

Howland testified he met with Gibson in September, "to share information about the collective bargaining process." McLeod was present at the meeting with Gibson, but he did not recall Looby being present. According to Howland, he told Gibson that "everything would go on the table" in negotiations. He said that "the negotiation process could take a fair amount of time with the particular union" and that it had taken the union over a year to negotiate a contract with another employer. He testified that Respondent receives funding from New York State and that, historically, employees receive raises every summer, the amount of the raise being dependent on the amount of money received from the State. With respect to the annual raise, Howland testified he told Gibson that, "If during the time of collective bargaining, the organization was up for or eligible for a raise, members of the collective bargaining unit may not be immediately eligible for that raise if they were still in the negotiation process." Howland further testified that he had similar conversations to the one he had with Gibson with 2 or 3 other employees. He supervises approximately 60 employees at seven facilities.

I found both Gibson and Howland to be credible and believable witnesses and because of Howland's admissions, it is unnecessary to credit one and discredit the other. Howland admitted he told Gibson that employees might be delayed in receiving their regular annual raise if the

union and the employer were engaged in negotiations.

Respondent argues that Howland's statement was lawful because, during collective bargaining, wages and benefits remain frozen until changed by an agreed-upon contract. That much is true. However, Respondent ignores the corollary of that principle, that an employer cannot unilaterally change an existing term and condition of employment simply because it is engaged in negotiations with a union. *Rural Metro Medical Services*, 327 NLRB 49, 50 (1998) cited by both the General Counsel and the Charging Party, is directly applicable here. In that case, the Board held:

When an employer has an established practice of granting wage increases according to fixed criteria at predictable intervals, a discontinuance of that practice constitutes a change in terms and conditions of employment, even if the amounts of increases have varied in the past (citations omitted). Thus, an employer's pre-election statement that it planned to discontinue an established system of merit wage increases if the union won the election would not be an accurate description of actions that could be lawfully taken as part of the collective-bargaining process...Such a statement, threatening the loss of so salient a benefit as anticipated wage increases simply as the price of electing a collective bargaining representative, is clearly coercive and violates Section 8(a)(1) of the Act.

Respondent has an established past practice of granting wage increases to its employees every July, the amount of the raise determined by state funding levels.³ Howland's threat that the wage increase might be withheld if Respondent was engaged in collective bargaining with the union constituted a threat in violation of Section 8(a)(1).

G. Petitioner's Objections

In Objection No. 2, Petitioner alleges that Respondent solicited grievances to discourage unionization. The credible evidence establishes two instances in July when Dale Ann Brown solicited grievances from employees Kum and Yarbrough. These incidents occurred outside the critical period, and I recommend this objection be overruled.

In Objection No. 3, Petitioner alleges that Respondent coercively interrogated employees concerning their union activity. The credible evidence fails to establish that any employee was coercively interrogated by an agent of Respondent under the *Rossmore/Bourne* criteria and I recommend the objection on this ground be overruled.

Evidence was adduced regarding two attempts by employee Danielle Birdsinger to put "vote no" stickers on two other employees. The first witness to testify to this conduct was Jeremy Lopuch. For reasons previously discussed, I found Lopuch to be neither a credible nor a reliable witness, and I discredited his testimony in its entirety. The second employee who testified to Birdsinger's attempt to put a "vote no" sticker on her, Scnada Stankovic, was a credible witness. Moreover, her testimony was uncontradicted since Birdsinger did not testify. Based upon Stankovic's testimony, I find that approximately 10 days before the election, Birdsinger tried to put a "vote no" sticker on Stankovic, conduct that prompted Stankovic to say she did not want to wear the sticker. The issue, however, is whether Respondent may be held responsible for Birdsinger's conduct.

³ In making this finding I do not take into consideration counsel for the Charging Party's reference in his brief to GC Exhibit 15, which was not received in evidence.

Birdsinger's title is habilitation inclusion coordinator. The only reliable evidence of Birdsinger's possessing any degree of authority over other employees is a disciplinary warning issued to Lopuch on October 24 signed by Ellen Benoit, assistant director of the Smith Center facility October 31 and copied to Birdsinger, and a disciplinary warning issued to Lopuch on October 31 signed by Birdsinger. These letters are insufficient in my view to establish that Birdsinger was a supervisor within the meaning of the Act. There is no evidence that Birdsinger was exercising independent judgment when she issued the October 31 warning, or that she had any role in effectively recommending the discipline of Lopuch by Benoit. Nor is there evidence that Birdsinger was acting with either actual or apparent authority of Respondent when she tried to put the sticker on Stankovic.

Because the evidence does not establish that Birdsinger was a supervisor or agent of Respondent within the meaning of the Act when she tried to put a "vote no" sticker on employee Stankovic, I recommend this objection be overruled.

In Objections No. 5, and 7 Petitioner alleges that Respondent threatened employees with discharge, job loss, discipline, and other unspecified reprisals because they engaged in union and protected concerted activity. The credible evidence establishes that on October 16, during the critical period, Laureen Sager warned employee Powell that her medical restrictions might be in jeopardy because Powell came to work early to leaflet for the union. The credible evidence further establishes that Powell received a similar warning from Mary Grace Pietrocolla on November 15, but this statement was made outside the critical period. I recommend Objections 5 and 7 be sustained based upon the conduct of Sager on October 16.

In Objection No. 8, Petitioner alleges that Respondent threatened employees that it would be futile to support the union. The credible evidence establishes that in July, Dale Ann Brown told employee Kum that the union would not succeed in getting employees higher wages. This statement was made outside the critical period. I recommend that this objection be overruled.

In Objection No. 9, Petitioner alleges that Respondent denied employees their *Weingarten* rights. The credible evidence establishes that on November 1 Betty Yarbrough was suspended, and on November 6 she was disciplined, because she invoked her *Weingarten* right to be represented in an investigatory interview. Powell credibly testified that the 10 employees who worked in her facility were aware of her suspension and discipline. This conduct occurred during the critical period and I recommend this objection be sustained.

In Objection No. 10, Petitioner alleges that Respondent threatened employees that they would be denied pay increases if they unionized. The credible evidence establishes that in mid-September, Aaron Howland told employee Gibson and two or three other employees that the annual wage increase routinely given to employees might be withheld if the employer was engaged in negotiations with the union. This conduct occurred during the critical period and I recommend that this objection be sustained.

In Objection No. 14, Petitioner alleges that Respondent unlawfully restricted employee communication concerning union and protected concerted activity. The credible evidence establishes that throughout the critical period, the employer maintained rules in its orientation materials and employee handbook that unlawfully restricted all bargaining unit employees from engaging in discussions about wages, benefits, and terms and conditions of employment. I recommend this objection be sustained.

Representation elections are not to be set aside lightly. The objecting party, in this case the Petitioner, bears a heavy burden of proof and must show that the objectionable conduct affected the employees in the voting unit. *Safeway, Inc.*, 338 NLRB No. 63, slip op. at 1 (2002). It is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election. However, the Board has departed from this policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results. In determining whether misconduct could have affected the results of the election, relevant factors that must be considered include the number and severity of the violations, the extent of dissemination, and the size of the unit. *Superior Emerald Park Landfill*, 340 NLRB No. 54 (2003); *Clark Equipment Co.*, 278 NLRB 498, 505 (1986). The closeness of the vote is also a relevant factor to be considered. *Quest International*, 338 NLRB No. 123, slip op. at 2 (2003).

This was a very close election. The Charging Party correctly points out that 21 votes in the other direction and the union would have been certified as the collective bargaining representative of this unit of 1058 employees. I have found that during the critical period, Respondent maintained overly broad confidentiality rules which affected all eligible voters, advised three to four employees that routine wage increases might be withheld if employees voted for the union, suspended and disciplined an employee for asserting her *Weingarten* rights, a fact was disseminated to 10 eligible voters, and told an employee that her medical restrictions were in jeopardy because she leafleted on behalf of the union. Each of these acts constituted unfair labor practices in violation of Section 8(a)(1), and given the closeness of the vote, it can reasonably be concluded that this conduct affect the results of the election. I therefore recommend that a second election be conducted.

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 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. Respondent has violated Section 8(a)(1) of the Act by maintaining, since the commencement of the 10(b) period on January 30, overly broad confidentiality rules that restrict employees from discussing wages, benefits, and other terms and conditions of employment.
4. Respondent, by Dale Ann Brown, violated Section 8(a)(1) of the Act on November 1, by suspending an employee, and on November 6 for disciplining that same employee, because the employee invoked her *Weingarten* right to be represented in an investigatory interview.
5. Respondent, by Dale Ann Brown, violated Section 8(a)(1) of the Act on two dates in July by soliciting grievances from employees and by implicitly promising to redress those grievances in order to dissuade employees from supporting the union.
6. Respondent, by Dale Ann Brown, violated Section 8(a)(1) of the Act in July by threatening an employee that it would be futile for employees to select the union as their collective bargaining representative.

7. Respondent, by Laureen Sager, violated Section 8(a)(1) of the Act on October 16 by threatening an employee with loss of her medical restrictions because the employee engaged in union activity.
- 5 8. Respondent, by Mary Grace Pietrocola, violated Section 8(a)(1) of the Act on November 15 by threatening an employee with loss of her medical restrictions because the employee engaged in union activity.
- 10 9. Respondent, by Aaron Howland, violated Section 8(a)(1) of the Act in September by threatening employees with the withholding of a routine wage increase if the employees selected the union as their collective bargaining representative.

Remedy

15 Having found that Respondent 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.

20 Having unlawfully suspended Betty Yarbrough on November 1, Respondent must make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension to the date of reinstatement, less any net interim earnings, 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).

25 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended direction of second election and order.⁴

DIRECTION OF SECOND ELECTION

30 A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. 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 the period because they were

35 ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls.

40 Ineligible to vote are employees who have been discharged for cause since the payroll period, striking employees who have quit or been discharged for cause since the strike began, and who have not been rehired or reinstated before the date of the election directed, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the Union of Needletrades, Industrial

45 and Textile Employees, AFL-CIO.

50 ⁴ 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.

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
 5 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.
 10 Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

ORDER

15 Respondent, Center for the Disabled, Albany, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- 20 (a) Maintaining in effect overly broad confidentiality rules that restrict employees from discussing wages, benefits, and other terms and conditions of employment;
- 25 (b) Suspending, disciplining, or otherwise discriminating against employees for invoking their *Weingarten* right to be represented in an investigatory interview;
- 30 (c) Soliciting grievances from employees and implicitly promising to redress those grievances in order to dissuade employees from supporting the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, or any other labor organization;
- 35 (d) Threatening employees that it would be futile to select as their collective bargaining representative the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, or any other labor organization;
- 40 (e) Threatening employees with loss of their medical restrictions if they engage in activities on behalf of the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, or any other labor organization;
- 45 (f) Threatening employees with the withholding of routine wage increases if employees select the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, or any other labor organization, as their collective bargaining representative.
- (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.

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

- (a) Within 14 days from the date of this Order remove from its files any reference

to the unlawful suspension and written discipline of Betty Yarbrough, and within 3 days thereafter notify Betty Yarbrough in writing that this has been done and that the suspension and written discipline will not be used against her in any way.

5

(b) Make Betty Yarbrough whole for any loss of earnings and other benefits suffered as a result of her suspension, in the manner set forth in the remedy section of this decision;

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(c) 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.

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(d) Within 14 days after service by the Region, post at all of its facilities in which unit employees are employed, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by 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, Respondent has gone out of business or closed the facility involved in these proceedings, 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 January 30, 2002.

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

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

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Dated, Washington, D.C.

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Margaret M. Kern
Administrative Law Judge

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⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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 a 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 maintain in effect rules that restrict you from discussing wages, hours, and other terms and conditions of employment.

WE WILL NOT suspend, discipline, or otherwise discriminate against any of you for supporting the Union of Needletrades, Industrial and Textile Employees, AFL-CIO (UNITE) or any other union.

WE WILL NOT solicit grievances from you and promise to redress those grievances in order to dissuade you from supporting UNITE or any other union.

WE WILL NOT threaten you that it would be futile to select UNITE or any other union as your collective bargaining representative.

WE WILL NOT threaten you with loss of your medical restrictions if you support UNITE or any other union.

WE WILL NOT threaten to withhold routine wage increases from you if you select UNITE or any other union as your collective bargaining representative.

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, make Betty Yarbrough whole for any loss of earnings and other benefits resulting from her suspension, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and written discipline of Betty Yarbrough, and **WE WILL**, within 3 days thereafter, notify her in writing that this has been done and that her suspension and written discipline will not be used against her in any way.

CENTER FOR THE DISABLED

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

111 West Huron Street, Federal Building, Room 901, Buffalo, NY 14202-2387

(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.