**Beverly Health and Rehabilitation Services, Inc., Its Operating Regional Offices, wholly-owned subsidiaries and individual facilities and each of them and/or Its wholly-owned subsidiary Beverly Enterprises-Pennsylvania, Inc., and Its individual facilities and each of them *and* District 1199p, Service Employees International Union, CLC, Service Employees International Union, Local 585, CLC and Pennsylvania Social Services Union Local 668 a/w Service Employees International Union.**[1] Cases 6–CA–28276, et al.

May 8, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On March 23, 2000, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs. The Respondent filed a reply to the General Counsel's answering brief.

The Respondent owns and operates nursing homes throughout the United States. The charges in this proceeding are based on the Respondent's conduct at 19 of its Pennsylvania facilities from late 1995 though early 1997. The conduct that is alleged to have been unlawful occurred primarily after the expiration of collective-bargaining agreements at 18 facilities and an April 1996 strike at 15 facilities, and includes alleged retaliation against employees for engaging in union activity, unilateral changes in terms and conditions of employment, and the withdrawal of recognition of the Union at 2 facilities.

The 19 facilities involved here were also the subject of litigation in *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001)[2] (*Beverly IV),* and the Respondent's conduct that gave rise to the charges here occurred within approximately the same time period as the conduct that gave rise to the allegations in *Beverly IV*. The complaint in this proceeding issued during the litigation of the allegations in *Beverly IV*, and the General Counsel moved to consolidate the cases at that time. The General Counsel's motion was denied, and the charges were subsequently litigated in a separate proceeding before Judge Socoloff.[3]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions[5] as modified below and to adopt the recommended Order as modified and set forth in full below.

I. THE RESPONDENT'S REFUSAL TO REINSTATE STRIKERS

Beginning on April 1, 1996,[6] the Union[7] engaged in a 3-day strike at 15 of the Respondent's facilities, including Fayette Health Care Center, Haida Manor, and Mt. Lebanon Manor. Afterward, the Respondent refused to reinstate the following employees who had participated in the strike: Mary Myers at Fayette; Tammy Rummel and Cathy Bobby at Haida Manor; and Sandra West and

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO on July 25, 2005.

[2] Enfd. in part 317 F.3d 316 (D.C. Cir. 2003).

[3] The Respondent argues that the prosecution of this case is barred under the standard set forth in *Jefferson Chemical Co.*, 200 NLRB 992 (1972). We agree with the judge's conclusion, for the reasons stated in his decision, that this argument has no merit.

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

[5] The Respondent has not excepted to the judge's conclusions that it violated the Act by threatening employees who had participated in a strike at Franklin Care Center and Murray Manor with reduced work hours, threatening employees at Mt. Lebanon that they would lose their jobs if they took part in a strike, instructing employees at Meadville Care Center and Beverly Manor of Lancaster to remove their union insignia, telling employees at Meadville that certain rules of conduct applied only to employees who had engaged in a strike, and reducing the hours of certified nursing assistant (CNA) Rickie Piper because she engaged in union activities. The General Counsel has not excepted to the judge's dismissal of allegations that the Respondent acted unlawfully by disciplining employees Anita Selfridge and Susan Teetsel.

The Respondent concedes that it made a number of unilateral changes in employees' terms and conditions of employment following the expiration of the collective-bargaining agreements at many of its facilities. The Respondent asserts, however, that it was privileged to make such changes by the management-rights clause of the expired agreements. Despite the fact that the Board has repeatedly rejected the Respondent's argument, and at least two courts of appeals have affirmed the Board on this issue, the Respondent reiterates it here. Chairman Battista and Member Schaumber note that, although they did not participate in any of the previous Board decisions that rejected the Respondent's argument regarding the survivability of management-rights clauses, the Board's rejection is extant Board law. Moreover, they would find that, without regard to whether the management-rights clause survived, the Respondent would be privileged to have made the unilateral changes at issue if the Respondent's conduct was consistent with a pattern of frequent exercise of its right to make unilateral changes during the term of the contract. Here, however, the Respondent has only asserted in a conclusory manner that it had such a practice. It has failed to support its assertion with record evidence. Accordingly, they would find that the Respondent's post-expiration unilateral changes were unlawful.

[6] All dates hereafter are in 1996, unless otherwise indicated.

[7] The Union is Service Employees International Union, CLC. The Charging Parties are affiliates of the Union. The term "Local Union" refers to the particular local union certified to represent the employees at the named facility.

Susan Chojnicki at Mt. Lebanon. The judge found that the Respondent's refusal to reinstate the employees violated Section 8(a)(3) and (1) of the Act. For reasons discussed below, we reverse.

The nature of the strike in April and the adequacy of the Union's strike notice under Section 8(g) of the Act[8] have previously been litigated in *Beverly IV*. The Board found that the strike notice complied with Section 8(g),[9] that the strike was an unfair labor practice strike, and that the Respondent violated the Act by refusing to promptly reinstate all employees who took part in the strike. Subsequently, the Respondent appealed the Board's decision to the U.S. Court of Appeals for the District of Columbia Circuit. 317 F.3d 316 (D.C. Cir. 2003).[10] Contrary to the Board's conclusions, the court held that the strike notice did not comply with the requirements set forth in Section 8(g), and that the strike was therefore not protected activity.[11] Accordingly, the court found that the Respondent had no duty to reinstate any of the striking workers, and refused to enforce the Board's Order.

We accept the court's decision as controlling here.[12] See *Dynatron/Bondo Corp.* 333 NLRB 750, 751 fn. 7 (2001). Thus, we find that the Respondent had no obligation to reinstate the above-mentioned employees, and its failure to do so did not violate the Act.[13]

## II. THE 8(A)(1) ALLEGATIONS

### *A. Videotaping*

On April 4, security guards at the Respondent's Haida Manor facility videotaped former strikers as they returned to work. The judge found that the videotaping constituted unlawful surveillance of protected activity. We disagree. The record shows that the employees were not actually engaged in protected activity at the time of the videotaping, but were merely reporting for work. Therefore, we reverse the judge and dismiss that allegation.[14]

### *B. Alleged Threats at Haida Manor*

The judge found that Assistant Director of Nursing Nancy Piatek unlawfully threatened CNA Cathy Bobby with discharge if she did not report to work during the April strike, and that Bobby unlawfully threatened applicant Margaret Moore that she would not be hired unless she agreed to cross a picket line. As discussed below, we reverse the judge's finding as to Bobby, and affirm his finding as to Moore.

The record shows that Piatek called Bobby at home on April 1, the first day of the strike, and left a message that Bobby was to report to work on April 3, even though she had not been scheduled on that day. On April 2, Bobby called Piatek and said that she was unable to work as requested because she had to take her mother to a doctor's appointment. Piatek then informed Bobby that she would not have a job if she could not work for at least an hour either before or after the appointment.

Unlike the judge, we do not find that Piatek threatened to discharge Bobby for engaging in protected activity. Under the facts presented, Bobby's refusal to work during the strike was either in direct support of the strike, which we have found was unprotected due to the 8(g) notice deficiencies, or it was based on the asserted reason that she had to take her mother to a doctor's appointment, a personal reason that does not implicate the protections of Section 7 of the Act. Thus, there is no evidence that Bobby's refusal to work on April 3 was con-

[8] Sec. 8(g) provides:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing . . . of that intention . . . . The notice, once given, may be extended by the written agreement of both parties.

[9] On March 14 and 15, the Union notified the Respondent that the Union would engage in a strike on March 29. Two days before the strike deadline, the Union sent a second notice that extended the deadline to April 1. Relying on *Greater New Orleans Artificial Kidney Center*, 240 NLRB 432 (1979) (union may unilaterally extend strike deadline up to 72 hours), the Board found that the extension of the strike notice was substantially in compliance with Sec. 8(g).

[10] On March 7, 2003, the Respondent filed with the Board a motion requesting that the Board take administrative notice of the court's decision. We grant the motion.

[11] The court rejected the Board's *Greater New Orleans* analysis and held that the plain meaning of the language in Sec. 8(g) precluded any unilateral change in the notice once it was given. See 317 F.3d at 320–321.

[12] Subsequently, in *Alexandria Clinic, P.A.*, 339 NLRB 1262 (2003), enf. 406 F.3d 1020 (8th Cir. 2005), the Board overruled *Greater New Orleans* and held that Sec. 8(g) does not permit a union to unilaterally alter the date or time of the strike deadline once notice has been given without first obtaining the consent of the employer. However, because we accept the court's decision as controlling, we find it unnecessary to reconsider the validity of the strike notice in light of *Alexandria Clinic*.

Although Member Liebman agrees that the court's decision in *Beverly IV* is controlling here, she adheres to her dissenting position in *Alexandria Clinic*.

[13] We affirm the judge's finding that Michael Walker, administrator of Meyersdale Manor, unlawfully threatened employee Linda Cochran with job loss if she took part in a strike. The record indicates that the threat was made about a week before the strike and before the Union sent its second notice postponing the strike. Therefore, the question of whether the strike was unprotected activity is not relevant to a finding of the unlawful threat.

[14] We agree with the judge, for the reasons stated in his decision, that the Respondent's videotaping of off-duty employees engaging in a strike at Haida Manor on June 2 was unlawful. See *Robert Orr-Sysco Food Services*, 334 NLRB 977 (2001), and cases cited therein.

Member Liebman would find it unnecessary to pass on whether the incident on April 4 involving videotaping, described above, was unlawful because such a finding would be cumulative, in light of the surveillance violation found on June 2, and would not substantially affect the remedy.

nected to any protected activity. Accordingly, we find no violation.

With regard to Moore, the record shows that she was interviewed by Piatek for a position as a CNA in early March, before the Union notified the Respondent of its intention to strike. Moore testified that during the interview, Piatek told her that "there was talk of a strike," and that "if the strike occurred, they would need people to cross the picket line because they were going to replace the workers." Piatek then asked Moore if she would cross a picket line, and told her that she would not be hired unless she agreed.

The Respondent does not dispute that Piatek conditioned Moore's hiring on her willingness to cross a picket line, but argues that Piatek's actions were lawful because Moore was hired as a strike replacement. We disagree. There is no evidence that the Respondent ever indicated to Moore, either before or during the interview, that the position for which she was being considered was that of a replacement worker. Thus, we find no merit in the Respondent's argument, and affirm the judge's finding of the violation.[15]

## III. THE 8(A)(3) ALLEGATIONS

### *A. Joyce Kircher*

We agree with the judge that the Respondent unlawfully discharged employee Joyce Kircher for making negative statements to a local newspaper reporter about the quality of care at Meadville Care Center. Kircher was contacted by the reporter shortly after the strike, at which time she expressed concern that patient care at Meadville had deteriorated since the Respondent had replaced the striking workers. Thus, contrary to the Respondent's assertion, Kircher's statement was related to the labor dispute. Moreover, there is no evidence that Kircher acted with malicious intent or that she knowingly gave false statements. In these circumstances, the Board has found such statements to be protected. See, e.g., *St. Luke's Episcopal Presbyterian Hospital*, 331 NLRB 761, 761–762 (2000), enf. denied 268 F.3d 575 (8th Cir. 2001)[16]; *Community Hospital of Roanoke Valley*, 220 NLRB 217, 223 (1975), enfd. 538 F.2d 607 (4th Cir. 1976). Thus, we affirm the judge.

### *B. Rose Girdany*

Rose Girdany was employed by the Respondent at Mt. Lebanon Manor. Girdany was a union officer, and participated in the April strike. Shortly after the strike, Girdany received a letter from the Respondent informing her that she was "not entitled to reinstatement at [that] time, but [would] be placed on a preferred hiring list based on seniority." Although Girdany was not immediately reinstated after the strike, she remained involved in the processing of employee grievances.

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[15] The judge also found that the Respondent violated Sec. 8(a)(1) of the Act at the York Terrace facility when it suspended five CNAs who refused to work mandatory overtime. Member Schaumber dissents from this finding. The expired contract gave the Respondent the right to mandate that CNAs work overtime consistent with procedures in the contract. On May 12, 1996, an employee called in sick, leaving the facility one CNA short under State regulations. After unsuccessfully seeking volunteers, the Respondent mandated that an on-duty CNA work overtime and five CNAs successively refused to do so. The Respondent suspended the five for that refusal. All agree that the CNAs acted concertedly in refusing the overtime. Member Schaumber, however, finds the CNAs' action was not protected because at the time their refusal to work overtime placed the Respondent in violation of State law, i.e., their refusal left the Respondent one CNA short under State regulations. In such circumstances, the refusal of the CNAs to work the mandatory overtime was "unlawful" and was not a protected activity. See *Keyway, a Division of Phase, Inc.,* 263 NLRB 1168, 1169 (1982) ("Conduct such as a concerted work stoppage . . . , even if engaged in by health care institution employees, is protected unless it is *unlawful*, violent, in breach of contract, or otherwise indefensible (emphasis added, citation omitted)." The Respondent was able to find someone to cover the shift after it suspended the five employees. This does not convert the prior lawful suspensions into unfair labor practices. Nor was there a need for the Respondent to inform the employees their refusal to work placed the Respondent in noncompliance with State regulations. The Respondent informed each of the CNAs that they would be disciplined because they were refusing to perform an assigned duty after being given a direct order to do so.

In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(1) by suspending employees who refused to work overtime, Chairman Battista and Member Liebman rely on the judge's finding that the Respondent admitted that the severity of the discipline was linked to the concerted nature of the employees' refusals. They further rely on evidence that, according to the testimony of the director of nursing at this facility, the Respondent was successful in locating a replacement for the person who had called in sick, and the evidence does not show that the suspensions were announced prior to the replacement being located. Accordingly, the Respondent was never short-staffed under the applicable State regulations. Moreover, there is no evidence to indicate that employees who refused to work overtime were ever informed or were otherwise aware that their refusals would have resulted in the Respondent not being in compliance with State regulations.

[16] In *St. Luke's Episcopal-Presbyterian Hospital*, the Board held that an employee who had appeared on a television newscast and criticized the respondent for engaging in conduct that jeopardized patient care was engaged in protected activity, and that the respondent unlawfully discharged her because of that activity. In finding the conduct to be protected, the Board found that the statements were "neither disloyal, recklessly made, nor maliciously false." Id. at 762.

On appeal, the U.S. Court of Appeals for the Eighth Circuit refused to enforce the Board's decision. Although the court acknowledged that the employee did not act maliciously, the court found that the statements were materially false and misleading, and that the employee's conduct was therefore unprotected. 268 F.3d at 580–581.

Even assuming that we were to apply the court's standard in this case, we conclude that there is no basis for finding that Kircher's statement was unprotected. In contrast to the evidence proffered by the respondent in *St. Luke's*, the Respondent here has failed to proffer any specific evidence to disprove Kircher's statements.

Approximately 2 months after she had received the Respondent's letter, Girdany went to Mt. Lebanon for a grievance meeting. She spoke with Administrator Anthony Molinaro, who told her that he did not like her attitude or her "mouth," that she no longer worked there, and that she had to leave the premises.

The judge concluded that Molinaro effectively discharged Girdany because of her union activities, and that the discharge was unlawful. We agree. Unlike the above-mentioned strikers who the Respondent refused to reinstate (see sec. I, supra), the Respondent placed her on a preferred hiring list. As a result, Girdany retained her employee status after the strike.[17] Although the Respondent claims that it did not discharge Girdany, the evidence shows that Girdany had a reasonable basis to believe that she had been discharged, and the Respondent failed to take the necessary steps to clarify that she had not been terminated. See *Grosvenor Resort*, 336 NLRB 613 (2001); *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 845–847 (2001). Accordingly, we affirm the judge.[18]

### *C. Susan Spiess*

On May 15, the Respondent suspended union delegate Susan Spiess in connection with an incident that occurred in the employee breakroom at the York Terrace Nursing Center. Prior to the start of her shift that day, Spiess was in the breakroom discussing with employee Diane Bridges a pending grievance over the discharge of a coworker. In addition to Bridges, there were several other employees in the breakroom at the time, including Lucy Myro. The credited evidence shows that at some point during the conversation, Myro stated that, in her opinion, the grievant who was the subject of the discussion did not deserve to be reinstated. Spiess then told Myro in a loud voice to "mind [her] f—king business." Myro began to cry and left the room. She then reported the incident to a supervisor. Later that day, Spiess was sent home and suspended for 3 days, based on the breakroom incident.

Applying a *Wright Line* analysis,[19] the judge found that the suspension was unlawful because the Respondent failed to demonstrate that Spiess would have been suspended in the absence of her union activity. We agree with the judge that the suspension was unlawful; however, we find *Wright Line* to be inapplicable here.

It is clear that Spiess' discussion of a pending grievance was a form of Section 7 activity, and that she was suspended therefor. Thus, the appropriate inquiry is whether Spiess' use of profane language in the exchange with Myro during that discussion removed her from the protection of the Act. See, e.g., *Felix Industries*, 339 NLRB 195 (2003). To determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4)whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). As discussed below, we find that a balancing of these factors here does not compel a finding that Spiess' conduct lost the protection of the Act.

With respect to the first (place) and fourth (provocation) factors, we find that those do not weigh in favor of or against finding Spiess' conduct unlawful.[20]

As to the second factor, we find that the subject of the conversation—the merits of a grievance seeking the reinstatement of a coworker—weighs in favor of finding that Spiess was engaged in protected conduct. See *Aroostook County Regional Opthalmology Center*, 317 NLRB 218 (1995), enf. denied on other grounds 81 F.3d 209 (D.C. Cir. 1996) (discussion of grievances among employees with a view toward pursuing concerted activity is protected under the Act).

Finally, as to the third factor (nature of the outburst), we find that Spiess' conduct "consisted of a brief, verbal

[17] The Respondent concedes that it did not treat Girdany the same as the other strikers that it refused to reinstate. In contrast to those employees, the Respondent put Girdany on a preferential rehire list. Whether or not the Respondent had an obligation to put Girdany on the preferential rehire list, once it did so, it forfeited its right to rely on her participation in the unprotected strike to justify her subsequent discharge. See *Virginia Mfg. Co.,* 310 NLRB 1261 (1993) (employer that expressed an initial willingness to reinstate strikers who had engaged in misconduct violated the Act by subsequently discharging them for that misconduct). Cf. Sec. 8(d)(4) (striker's loss of employee status "shall terminate if and when he is reemployed" by the employer). Moreover, such a justification is inconsistent with the Respondent's defense that it did not actually discharge Girdany.

[18] Member Schaumber disagrees with his colleagues and respectfully dissents. In his view, Molinaro's words did not constitute a discharge but the administrator's expression of a fact; Girdany was not yet reinstated, thus she did not work at the facility. Consequently, he would dismiss this allegation.

[19] See *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[20] In regard to the first factor, the record shows that the exchange between Spiess and Myro occurred off the clock in a nonpatient care area, and there is no evidence that the conversation was overheard by patients or visitors, or that it otherwise caused any disruption of operations at the facility. Thus, this factor does not weigh for or against finding Spiess' conduct protected.

With respect to the fourth factor, the Respondent did nothing to provoke Spiess' outburst, and although the employees were discussing a grievance against the Respondent at the time of the outburst, Spiess was obviously reacting to her coworker's comments, and not any action by the Respondent. This factor does not weigh for or against finding Spiess' conduct protected either.

outburst of profane language" and was unaccompanied by insubordination, physical contact, or threat of physical harm. See generally *Felix Industries*, supra at 196. Moreover, it is well established that the Act allows employees some leeway in the use of intemperate language where such language is part of the "res gestae" of their concerted activity. *Thor Power Tool Co.,* 148 NLRB 1379, 1380 (1964), enfd. 351 F.2d 584 (7th Cir. 1965). See also *Traverse City Osteopathic Hospital*, 260 NLRB 1061, 1061–1062 (1982), enfd. mem. 711 F.2d 1059 (6th Cir. 1983) (employee's use of profanity during conversation urging employees to support the union was not so egregious as to remove conduct from the Act's protection). Given the subject of the conversation and the relatively isolated location in which it occurred, we find that this brief outburst does not tip the balance in favor of finding the conduct to have been unprotected.[21]

In sum, the balance of these factors favors a finding that Spiess' conduct was protected. Therefore, we conclude that the judge properly found that the Respondent's suspension of Spiess for engaging in that conduct was unlawful. Contrary to our dissenting colleague, we would not find that the location and the nature of the breakroom exchange between two employees, occurring away from patient-care areas, should cause this conduct to lose the Act's protection solely because the Respondent provides nursing care to its clients. The dissent's approach would effectively ban any employee discussion about grievances that might lead to increased tension in the work environment regardless of where that discussion took place, and is in conflict with the general standards for regulating union solicitations in health care facilities. See generally *NLRB v. Baptist Hospital,* 442 U.S. 773, 781 (1979).[22]

*D. Glenda Smith*

We agree with the judge that the Respondent did not violate the Act when it suspended employee Glenda Smith for referring to a supervisor in a derogatory manner. The evidence shows that on September 19, a group of employees, including Smith, were handing out union leaflets near the driveway exit of the William Penn Nursing Center. Around 3 p.m., Smith saw Assistant Director of Nursing Kimberly Stuck driving out of the facility. Smith stepped into the driveway and attempted to flag Stuck down so that she could inquire about a convenient time to discuss Smith's vacation request. Stuck smiled and waved at Smith, but continued to drive past her. Smith, who believed that Stuck had attempted to run her down, then turned to another employee and, in a voice loud enough for Stuck to hear, referred to Stuck as "that bitch." Subsequently, the Respondent suspended Smith for 3 days.

Essentially applying a *Wright Line* analysis, the judge found that the General Counsel had met his threshold burden but that the Respondent had demonstrated it would have suspended Smith for her disrespectful behavior towards Stuck even absent its unlawful motivation. We affirm the judge's findings.[23] We do not think that the judge made inconsistent findings. He found that *Smith believed* that Stuck attempted to run her over. However, Stuck did not share that view and, thus, *Stuck*

[21] Chairman Battista did not participate in *Felix Industries*, and he expresses no view as to whether it was correctly decided. However, he finds that Spiess' conduct is not as reprehensible as that in *Felix*, and he agrees with the judge that this conduct was not so outrageous as to lose the Act's protection.

[22] Member Schaumber agrees with his colleagues that the second *Atlantic Steel* factor weighs in favor of finding Spiess' conduct protected and that the fourth factor is neutral. However, he finds the first and third factors weigh in favor of finding Spiess' conduct unprotected. Spiess is not any employee. Only 6 months earlier, she received a written warning for being "disrespectful and hostile to fellow *associates* during meetings, breaks and resident cares." (Emphasis added.) Further, Respondent is not any employer. It operates a nursing home where the maintenance of a quiet environment is necessary for the health and well being of its elderly patients. Thus, an employer's responsibility to foster a harmonious working environment and to take corrective action to avoid the creation of a hostile work environment is also necessary for the Respondent to fulfill its obligations to its residents and their families. While Spiess' profane verbal attack, which occurred in the breakroom of the nursing home, may not have been heard by the residents or their visitors, it was the second incident in 6 months and was the kind of attack that can provoke further confrontation. At the least, it creates tension among employees which is not easily left at the breakroom door. A profane attack in a nursing home breakroom in response to an employee's comment with regard to a grievance is not a protest addressed to picket line crossovers during a strike where a combination of exuberance and tension might reasonably lead to harsh and profane language. Under these circumstances, Member Schaumber would find Spiess' outburst at a fellow nursing home employee unprotected. In his view, Respondent's discipline in suspending Spiess was a measured response consistent with its responsibilities as an employer and nursing home operator and finding no violation in it is hardly "in conflict with the general standards for regulating union solicitations in health care facilities," as his colleagues claim. Rather, it is an acknowledgment that Spiess' conduct went beyond the bounds of protected activity and accordingly that she was appropriately disciplined for it.

[23] Member Liebman disagrees and would find that the Respondent did not show that, notwithstanding its unlawful motivation, it would have disciplined Smith for calling Stuck "that bitch." The majority adopts the judge's analysis, which is based on contradictory findings. The judge first found that while Smith was leafleting, Stuck approached in her vehicle and drove by Smith "in a manner leading Smith to believe that Stuck was attempting to run her over." Nonetheless, the judge concluded, inconsistently, that Smith's outburst "that bitch" was "an apparently unprovoked remark." Given the former finding, it is inconceivable that, absent unlawful motivation, the Respondent would have suspended an employee for excitedly uttering "that bitch" in response to what she perceived was a vehicle driving towards her. Member Liebman would therefore not find that the Respondent has met its burden of proof.

*believed* that Smith's outburst was unprovoked. Smith was suspended because of that perceived unprovoked outburst. There is no evidence that the Respondent would have tolerated such disrespectful conduct towards a supervisor, or that Smith received disparate treatment. Accordingly, we dismiss the allegation.

*E. Janet Crissman*

Janet Crissman is employed by the Respondent as a CNA at Clarion Care Center. Crissman is a union delegate whose duties include representing the Union in the grievance process. The judge found that the Respondent's discipline of Crissman on two separate occasions was motivated by antiunion animus. The Respondent has excepted to the judge's findings and contends that it has demonstrated that the discipline was lawful in both instances. We find merit in the Respondent's exceptions.

On April 9, Crissman was disciplined for failing to respond to a patient's tabs unit, which is an alarm attached to a patient who is at risk of falling from his bed. The unit had gone off several times that morning as the patient moved around in his bed. Crissman had responded to the alarm each time, and found the patient was in no danger. When the unit went off again as Crissman was distributing breakfast trays, she ignored it and continued to distribute the trays.

As Crissman was distributing trays, Supervisor Sally Doran got off the elevator and heard the alarm. Doran walked past Crissman towards the patient's room and told Crissman that she should be getting that tabs unit. Crissman assumed that Doran was going to respond to the alarm, continued to distribute the trays, and did not attend to the alarm. Later that day, Crissman received a written warning. Crissman was not asked to explain why she failed to respond to the tabs unit before the warning was issued.

The judge found that the Respondent's failure to solicit an explanation from Crissman is evidence of an unlawful motive. We disagree. Crissman does not dispute that it was her responsibility to respond to the tabs unit, and that she did not respond even after Doran told her to do so. Crissman's conduct in failing to respond to the patient's tabs unit was directly observed by Supervisor Doran, so that it was unnecessary for the Respondent to investigate the incident further in order to ascertain whether the basis for the discipline had occurred. In these circumstances, we do not find that the Respondent's failure to interview Crissman about the incident is indicative of an unlawful motive. Cf. *NKC of America, Inc.*, 291 NLRB 683 (1988) (employer's failure to conduct thorough investigation of prounion employee's role in altercation with antiunion employee prior to discharging prounion employee was evidence of unlawful motive). Therefore, we find no violation.

Similarly, the judge found that a written warning issued to Crissman on April 19 was unlawful based on the Respondent's failure to interview Crissman before the discipline was issued. As explained more fully by the judge, the evidence shows that some time after Crissman had taken a patient to the bathroom that morning, the patient complained to Nursing Supervisor Tammy Shreckengast. Shreckengast examined the patient and found that he had not been properly cleaned after toileting. Crissman was then given a written warning for failing to properly perform her job duties.

As with the incident on April 9, we do not find that the Respondent's failure to ask Crissman for an explanation prior to issuing the discipline demonstrates that the Respondent acted with an unlawful motive. Crissman does not dispute that she was the one who was responsible for the patient's toileting that morning, and the credited testimony establishes that the patient's condition thereafter was not consistent with proper care. In these circumstances, where the supervisor observed directly the condition of the patient, the lack of further investigation by the Respondent does not support a conclusion that this discipline was unlawful. Accordingly, we find no violation.

*F. Jean Haver*

Jean Haver was employed as a CNA at Beverly Manor of Lancaster from 1985 until September 1996, when she was discharged by the Respondent for excessive absenteeism. The judge found that Haver, the chief shop steward at Lancaster, was discharged because of her union activities. For reasons discussed below, we reverse.

On August 13, Haver called the facility and reported that she was not coming to work because she was ill. Later that day, Executive Director Larry Ayers observed Haver walking down the street with her granddaughter. Several days later, Ayers asked Haver to provide a doctor's excuse for her absence. Haver never provided the excuse. Consequently, Haver was charged with a violation of the Respondent's attendance policy.[24] She was suspended on August 26 pending an investigation, and discharged on September 24.

Contrary to the judge, we find that the Respondent has established that Haver was discharged in accordance with its progressive disciplinary policy, which provides that an employee who has received three written warnings for rules violations within a 12-month period may be sus-

[24] The attendance policy provides that the Respondent may require a doctor's excuse to validate an employee's illness, and that failure to provide such an excuse may be grounds for disciplinary action.

pended and discharged for a subsequent offense. The record indicates that the written warning issued to Haver because of her absence on August 13 was her fourth violation of the disciplinary policy.[25] Thus, it is apparent that the Respondent's actions were consistent with its disciplinary policy when it suspended and discharged Haver.

Further, the record demonstrates that Haver had received numerous warnings about her attendance that dated back to 1991. Although these earlier warnings are outside of the 12-month period considered for purposes of employee discipline, they support the Respondent's assertion that it had a longstanding concern about Haver's absenteeism, and that it was acting pursuant to that concern when it decided to discharge Haver. Accordingly, we reverse the judge and dismiss the allegation.[26]

[25] Although the first two written warnings Haver received were not introduced in evidence, a written warning issued to Haver on July 31 indicated that it was her third written warning within the relevant time period.

[26] Member Schaumber disagrees with his colleagues' adoption of the judge's findings that the Respondent violated Sec. 8(a)(3) by suspending and then discharging Licensed Practical Nurse (LPN) John Wilson from its Monroeville facility and disciplining employee Leatha Smith at its Meadville facility.

The Respondent contended that it discharged Wilson for resident neglect and falsification of records. The judge found that the reasons the Respondent proffered were pretextual and were motivated by antiunion animus. Member Schaumber respectfully disagrees. He would find that the Respondent met its rebuttal burden. A resident, Feldmeier, separately reported to CNA Cynthia DePosto and LPN Rita Pistininzi that Wilson presented her medication crushed in applesauce after she had requested that the medication not be crushed in her food but given to her whole. In response, Wilson threw the applesauce away and left Feldmeier's room, as a result of which Feldmeier never received her medication that day. Wilson did not record his failure to give Feldmeier her medication. As can be imagined, the alleged misconduct was in direct contravention of the Respondent's policies. When the incident reached the attention of higher management, Director of Nursing (DON) Bonnie Forney interviewed Feldmeier as well. Feldmeier recounted the same set of facts to Forney as she had to DePosto and Pistininizi Without any explanation, the judge found there was "credible record evidence" that Feldmeier was "confused and suffered from memory lapses" but Feldmeier's description of the incident to Forney was consistent with what she told DePosto and Pistininzi. While the record does ultimately reveal a possible source for the judge's comment that Felmeier was confused (i.e., the testimony of Josie Belice), the judge failed to acknowledge it or the contrary testimony of DON Forney that Feldmeier, as a Lou Gehrig's disease patient, had a weakened physical condition but "remains alert, very oriented." Given the failure of the judge to discuss this testimony, Member Schaumber gives little weight to the judge's finding that Feldmeier was confused. And, while the judge faulted the Respondent for failing to interview Wilson before it discharged him, the General Counsel presented no evidence showing that employees at Monroeville, who were not prounion, were treated differently than Wilson during similar investigations. In these circumstances, Member Schaumber finds the Respondent has demonstrated it would have discharged Wilson even in the absence of his protected activities. See *Vencor Hospital-Los Angeles*, 324 NLRB 234 (1997) (discharge lawful where employee committed patient error in violation of hospital's protocol).

The judge also found that the Respondent disciplined employee Leatha Smith for discriminatory reasons. In particular, the judge found that the Respondent "disciplined Smith . . . for an offense that they have not shown she committed" and the Respondent "summarily acted on the reports of new hires without even seeking to obtain her version of events." Member Schaumber disagrees. DON Julie Walters disciplined Smith by reprimanding her for failing to respond to a patient's call bell. Walters relied on two eye witness reports and followed her normal procedure in preparing the reprimand. While the judge found that Walters handed the reprimand to Smith without asking for an explanation, the evidence does not support that finding. Smith simply testified, "I don't believe so" when asked whether Walters asked Smith for an explanation. Against this equivocal testimony, Walters testified specifically that following her usual routine, she told Smith what had been reported to her and gave her the opportunity to respond by adding comments in the "associate comments" section of the reprimand. Walters testified that if an employee adds comments in the "associate comments" section then she would "look at that and will then follow up, to what we feel is appropriate." Smith, however, said nothing nor did she add any comments; she simply signed the reprimand. In these circumstances, in the absence of any demeanor based credibility determination, Member Schaumber finds no violation in the reprimand issued to Smith assuming a failure to give Smith an opportunity to give a verbal explanation would render the reprimand a violation.

In affirming the judge's finding that the Respondent unlawfully disciplined employees Wilson and Smith, Chairman Battista and Member Liebman agree with the judge that the Respondent seized on pretextual bases to discipline long-term employees with good work records. As to employee Wilson, they disagree with their colleague that the Respondent met its rebuttal burden to justify the discipline imposed on Wilson. Although Member Schaumber recites facts which, in his view, support the Respondent's claim that Wilson engaged in misconduct as to a patient, Chairman Battista and Member Liebman note that there are record facts, properly relied on by the judge, which conflict with that account. Thus, employee Josephine Belice specifically testified that patient Feldmeier had periods of memory lapses and was often confused as to whether someone had been in her room. Second, even assuming the facts relied on by the dissent, Chairman Battista and Member Liebman find that they are insufficient to rebut the judge's findings that the Respondent seized on the incident as a pretext to discharge a 10-year employee without even affording him an opportunity to explain what had occurred. Finally, the Respondent had the burden to rebut the General Counsel's showing that Wilson's discharge was unlawfully motivated. That is, it was incumbent upon the Respondent to show that other employees were treated similarly to Wilson. The Respondent has not shown that it has discharged employees in the past based upon a patient complaint, without hearing the employee's side of the story. Accordingly, it would be inappropriate to shift the burden to the General Counsel to affirmatively show disparate treatment in the disciplinary procedures imposed against Wilson.

With respect to Smith, Chairman Battista and Member Liebman disagree with their colleague's suggestion that the judge's finding that the Respondent unlawfully disciplined Smith is in error to the extent that it relies on his finding that Beverly failed to give Smith an opportunity to explain her alleged failure to respond to a patient's call. It may be that Smith testified only that she "believed" she had not been asked to explain, but there is no affirmative evidence that Smith had been given an opportunity to explain, other than through the comment section on the disciplinary form that she was provided. However, there is no evidence that Smith was ever informed that adding a comment on that completed disciplinary form could have any influence over already imposed discipline.

## IV. THE 8(A)(5) VIOLATIONS

### *A. Deduction of Health Insurance Premiums from Strikers' Wages*

After the April strike, the Respondent deducted from the strikers' paychecks the sum that it paid for their health insurance premiums for the 3 days that the employees were out on strike. It is undisputed that the Respondent did not notify or bargain with the Union before it made the deductions.

The General Counsel alleged that the deductions constituted an unlawful unilateral change. The judge found that the deductions were made pursuant to contractual provisions and established policy and therefore did not violate the Act. For the reasons discussed below, we reverse.[27]

As set forth in detail by the judge, the Respondent has an established policy of allowing employees who are on unpaid leaves of absence to continue their health care coverage by paying the total cost of their premiums for the time they are on leave. Under this policy, the choice of whether to continue health care coverage is left up to the individual employee. In the case of the striking employees, however, it was the Respondent's choice which determined the continued health care coverage for employees, not that of the individual employees. Because the policy leaves the choice to the individual and not the Respondent, we find that the Respondent's unilateral actions in continuing coverage and making the deductions were not required by the agreed-to policy. Accordingly, we find that the Respondent has violated the Act by deducting the premiums without first giving notice to and bargaining with the Union. Cf. *Simplex Wire & Cable Co.,* 245 NLRB 543 (1970) (no violation found where employer ceased to pay premiums during strike but notified employees of their right to convert insurance to individual coverage).[28]

[27] We agree with the judge that an employer is not generally required to continue paying health insurance premiums for employees who are on strike, or in any way finance a strike against itself. See, e.g., *Sherwin-Williams Co.*, 269 NLRB 678 (1984); *Simplex Wire & Cable Co.*, 245 NLRB 543 (1979). Here, however, the Respondent did more than simply cease paying its share of the insurance premiums; rather, the Respondent paid the premiums and then deducted from employees' paychecks a pro-rated share of the premiums for the 3 days that they were on strike. Further, there is no evidence that the deductions represented any additional expenses related to health insurance that were incurred by the Respondent as a result of the strike.

[28] We find it unnecessary to pass on whether the unilateral deductions also violated Sec. 8(a)(3), as alleged, because any remedy would be cumulative and would not substantially affect the remedy provided. See, e.g., *Tri-Tech Services, Inc.*, 340 NLRB 894, 895–896 (2003); *Sygma Network Corp.*, 317 NLRB 411 fn. 1 (1995).

### *B. Refusal to Provide Requested Information*

Shortly after the strike, the Union requested information concerning all employees who had been hired after March 15, including strike replacements, at 12 of the Respondent's facilities.[29] The information requested included the names, addresses, phone numbers, dates of hire, job classifications, and wage rates of the employees. The Respondent failed to provide the information at two of the facilities; at the other facilities the Respondent provided incomplete information by refusing to identify employees by name because of alleged concerns about possible harassment of strike replacements. The judge found that the Respondent's refusal to provide the requested information in its entirety was unlawful. We agree.

It is well established that the type of information requested by the Union is presumptively relevant for purposes of collective bargaining and must be furnished upon request. See *Stanford Hospital & Clinics,* 338 NLRB 1042 (2003), and cases cited therein. The obligation to furnish information includes providing information with regard to permanent strike replacements, unless there is a clear and present danger that the information would be misused by the union. See *Page Litho, Inc.*, 311 NLRB 881, 882 (1993), and cases cited therein, enfd. granted in part and denied in part mem. 65 F.3d 169 (6th Cir. 1995).

Applying these principles here, we find that the Respondent violated the Act by failing to comply with its obligation to provide the Union with the requested information. The Respondent contends that it was justified in withholding the information because the strike replacements were likely to be harassed if the information was released to the Union. We agree with the judge that the evidence does not support this contention.

The evidence shows that on about April 19, Regional Vice President of Operations Wayne Chapman sent to the administrators of facilities that were in the process of bargaining with the Union a fax containing general instructions as to how they should respond to union requests for various types of information. These instructions were not specific to any one facility. Rather, all administrators were instructed to respond to the Union's requests for names of employees in precisely the same manner: by maintaining that there were incidents of harassment under investigation. Additionally, as found by the judge, there is no evidence of harassment of employ-

[29] The facilities at which requests were made include the following: Franklin Care Center, Meadville Care Center, Murray Manor, Beverly Manor of Monroeville, Clarion Care Center, Fayette Care Center, Meyersdale Manor, Mt. Lebanon Manor, Richland Manor, William Penn Nursing Center, Beverly Manor of Reading, and Carpenter Care Center.

ees at nine of the above-mentioned facilities, and only some general testimony about isolated incidents at the other three facilities. In context, this evidence is inadequate to establish the required showing of a clear and present danger to justify withholding the information requested. Accordingly, we affirm the judge's finding of an 8(a)(5) and (1) violation.[30]

The judge also found that the Respondent violated the Act by refusing to respond to the Union's September 1996 information requests regarding the current employee work force unless the Union agreed to pay the costs of producing the information.[31] The Respondent argues that its refusal was justified because providing the requested information would have been unduly burdensome. We find no merit in this argument.

It is the Respondent's burden to show that the production of the information requested by the Union was unduly burdensome. *Martin Marietta Energy Systems,* 316 NLRB 868 (1995); *Tower Books*, 273 NLRB 671 (1984). The Respondent has failed to meet that burden. The evidence indicates that the type of information that the Union requested in September had routinely been supplied in the past at the Respondent's expense, and the Respondent has offered no explanation as to why it could not do so for the September requests. Thus, we find that the Respondent's refusal to provide the information was unlawful.

*C. Alleged Unilateral Changes at Richland Manor*

At Richland Manor, the Respondent had routinely provided employee work schedules to the Local Union on a biweekly basis pursuant to an arrangement between the Respondent and Local Union Representative Margaret Pynkala. After April, the Respondent refused to continue providing the schedules. The Respondent had also routinely provided seniority lists to the Local Union pursuant to a provision in the collective-bargaining agreement. When the collective-bargaining agreement expired in December 1995, the Respondent refused to provide the information.

The judge found that the Respondent acted unlawfully by unilaterally terminating its practice of providing the Local Union with this information. We agree. Both seniority and work schedules are mandatory subjects of bargaining. Thus, the Board has held that a union is entitled to information regarding seniority (*Falcon Wheel Division, L.L.C.,* 340 NLRB 315, 316 (2003)), and work schedules (*Hospital Episcopal San Lucas,* 319 NLRB 54, 56–57 (1995)), because that information is essential to the union's performance of its duties as the employees' bargaining representative. Here, the parties had established a practice by which the information was provided to the Local Union on a routine basis, and the Respondent terminated that practice without notice to or consulting with the Local Union. Accordingly, we find that the Respondent's unilateral actions violated the Act.

*D. Changes in the Weekend Call-Off Policy at Beverly Manor of Monroeville*

In March, the Respondent announced at its Monroeville facility that it was going to enforce a policy that would require employees who "called off" sick on weekends to provide a doctor's excuse. Although the evidence indicates that the policy had been in existence for some time before the March announcement, Executive Director Casimer Wieczorek admitted that, despite the fact that the policy was in the collective-bargaining agreement, "prior to [March] we were not requesting doctors' excuses for weekend call offs." The Respondent did not bargain with the Union before the implementation of this previously dormant policy. In these circumstances, we agree with the judge that the enforcement of the policy constituted an unlawful unilateral change in working conditions. See, e.g., *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001); *Rockwood & Co.*, 281 NLRB 862, 875 (1986), enfd. 834 F.2d 837 (9th Cir. 1987).

*E. The Alleged Change in Overtime Policy at Fayette Health Care*

In May 1994, the Respondent implemented a policy at its Fayette facility concerning mandatory overtime.[32] The policy provided that mandatory overtime would be used to cover staffing shortages only in limited circumstances, and that employees who refused to work overtime when requested would be suspended for a first refusal and discharged for a second refusal. No employee was disciplined under the policy for 2 years until June, when two employees were suspended after an initial refusal to work overtime.

[30] Chairman Battista does not endorse the view that a clear and present danger must be shown. He also notes that he shares the Respondent's concern about the potential for harassment that could ensue from employers providing unions with names, addresses, and phone numbers of strike replacement workers. He joins the majority here, however, in finding that the Respondent's failure to provide such information was unlawful because the Respondent failed to demonstrate that its concern about potential harassment was genuine or that it was based on *any* specific evidence regarding the likelihood of harassment.

[31] The requests were made at Clarion Care Center, Franklin Care Center, Haida Manor, Meadville Care Center, Murray Manor, Richland Manor, William Penn Nursing Center, Beverly Manor of Lancaster, Caledonia Manor, Camp Hill Care Center, and Blue Ridge Haven Convalescent Center.

[32] This policy was apparently consistent with provisions regarding mandatory overtime in the Respondent's collective-bargaining agreement with the Local Union.

The judge found that the enforcement of the policy constituted an unlawful unilateral change in violation of Section 8(a)(5) and (1). We disagree.

To establish a violation, the General Counsel has the burden to show that the Respondent's suspension of the employees in June was an actual change in terms of employment. See *Fresno Bee*, 339 NLRB 1214 (2003). We find that the General Counsel has not met that burden. The Respondent contends that it had not been necessary to discipline any employees under the policy prior to June because finding employees to work overtime had not been a problem until that time, and there is no evidence to disprove that contention or otherwise show an inconsistent or disparate application of the policy. Further, unlike the situation at Monroeville, discussed above, there is no evidence that the policy had previously been dormant and then resurrected at the Respondent's discretion. Under these facts, we agree that the General Counsel has not met his burden and, accordingly, we dismiss the allegation.

### *F. Withdrawal of Recognition at Grandview Health Care*

Sometime in the spring of 1996, an employee at Grandview Health Care presented a petition to the Respondent expressing a desire on the part of employees to abolish the Union as their bargaining representative.[33] The Respondent conducted a secret-ballot poll among employees in August, and subsequently withdrew recognition of the Union based on the results of the poll. The judge found that these actions by the Respondent were unlawful. We agree.

At the time of the poll and the withdrawal of recognition, there were a number of unremedied unfair labor practices at Grandview, as had been found by the Board in *Beverly IV*. These unfair labor practices, summarized below, included violations of Section 8(a)(5), (3), and (1) of the Act. See 335 NLRB at 654–657, 664–666. In that case, the Board found that in December 1995, after the expiration of the collective-bargaining agreement, the Respondent began denying union representatives access to the Grandview facility, thus preventing the representatives from meeting with employees for purposes of dealing with their work-related concerns. The Respondent also removed bulletin boards that were used by the Union to communicate with employees, or removed union-related materials from those bulletin boards. Further, in January and February, the Respondent unilaterally reduced or changed the number of work hours of some unit employees at that location, and also changed its rules regarding vacation scheduling. In anticipation of the April strike, the Respondent unilaterally canceled vacations, personal days, and requests for days off without pay. The Respondent also discriminated against Grandview employees who had been open supporters of the Union. In January, the Respondent reduced the hours of an employee who had been selected as the Union's negotiator. In early March, the Respondent terminated an employee because of her continuing support for the Union.

It is well established that an employer may not conduct a poll to assess employee support for a union where the employer has engaged in unfair labor practices or has otherwise created a coercive atmosphere. *Struksnes Construction Co.*, 165 NLRB 1062, 1063 (1967); see also *Storer Communications, Inc.*, 297 NLRB 296, 299 (1989). Given the nature of the outstanding unfair labor practices at the time the poll was conducted, we find that the Respondent's actions created a coercive atmosphere in which the Union was likely to lose support among employees. Thus, we find that the poll was unlawful. Accordingly, we find that the Respondent's withdrawal of recognition from the Union, based upon the results of the poll, was also unlawful. See, e.g., *Hojoca Corp.*, 291 NLRB 104, 106 (1988), enfd. 872 F.2d 1169 (3d Cir. 1989).

We also find that the Respondent, having created the circumstances under which the Union was likely to lose support, was precluded from withdrawing recognition from the Union based on the loss of that support. It is established law that "an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union." *Broadway Volkswagen,* 342 NLRB 1244, 1247 (2004) (citations omitted). In determining whether a causal relationship between the unremedied unfair labor practices and the loss of union support, the Board considers the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employees disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

Applying these factors here, we conclude that the Respondent's violations of the Act at Grandview would likely cause the Union to lose support among employees. We find that these unfair labor practices, discussed above, would tend to have a chilling effect on the exercise of Section 7 rights by employees, although they occurred approximately 6–8 months prior to the poll and

[33] There are few details in the record with regard to the petition.

the withdrawal of recognition.[34] In particular, the Respondent's discharge of an active union supporter was "exceptionally coercive and not likely to be forgotten," and would likely "reinforce[] the employees' fear that they will lose employment if they persist in union activity." *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067–1068 (2001). Further, by unilaterally changing working hours and vacation policy, the Respondent undermined the Union's position as the collective-bargaining representative and conveyed a message to employees that it can set important terms and conditions of employment without the Union's input. See *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 155–156 (1998).

It is apparent that any evidence proffered by the Respondent that the Union had lost support among employees was causally related to the unfair labor practices discussed above. We therefore affirm the judge's finding that the Respondent's withdrawal of recognition of the Union at Grandview violated the Act.[35]

*G. Withdrawal of Recognition at Mt. Lebanon Manor*

Similarly, we find that the judge properly concluded that the Respondent's withdrawal of recognition of the Union as the bargaining representative of employees at Mt. Lebanon Manor violated the Act. The Respondent withdrew recognition of the Union in November after receiving a petition purportedly signed by a majority of unit employees indicating that they no longer wished to be represented by the Union. As with the Grandview facility, there were a number of unremedied unfair labor practices at Mt. Lebanon at the time recognition was withdrawn. These included unilateral changes regarding access of union representatives and reduction of working hours as set forth above. Additionally, at Mt. Lebanon the Respondent unilaterally changed the badge/timekeeping system at the facility, and refused to bargain with the Union over the implementation of an incontinence program. See *Beverly IV*, 335 NLRB at 654–656.

As discussed above, these unilateral actions by the Respondent were likely to result in loss of union support among employees. Therefore, we find that the Respondent was precluded from withdrawing recognition from the Union, and its actions violated the Act as alleged.

*H. Change in the Timekeeping System at Beverly Manor of Lancaster*

In December 1995, the Respondent implemented a new timekeeping system at its Lancaster facility under which employees were required to swipe their name badges through a machine to record arrival and departure times. Employees who forgot their badges were sent home to get them and were not paid for the missed worktime. Prior to December, the Respondent utilized a punchcard system of timekeeping. The Respondent did not give notice to or bargain with the Union over the change.

The judge found that the implementation of the new timekeeping system was not a material or substantial change in working conditions, and that the Respondent's unilateral implementation of the system was not unlawful. We disagree. In *Beverly IV*, the Board found that the implementation of this same system at Mt. Lebanon was a material change that affected terms and conditions of employment. See 335 NLRB at 656–657. Because there is no basis on which to distinguish the situation here from that at Mt. Lebanon, we find that the Respondent's unilateral implementation of the system violated the Act.[36]

V. ALLEGATIONS NOT RULED ON BY THE JUDGE

The General Counsel has excepted to the judge's failure to make specific findings as to some of the complaint allegations, findings that would follow logically from the facts and the violations he did find. Because the issues were alleged and fully litigated, and the violations are

[34] We observe that the unfair labor practices were committed closer to the time when the employees first expressed their desire to rid themselves of union representation in the spring of 1996.

[35] We also affirm the judge's finding the Respondent violated the Act by refusing to process grievances and to continue COPE deductions after it withdrew recognition from the Union.

[36] Neither Chairman Battista nor Member Schaumber participated in *Beverly IV*. For institutional reasons, they accept that as the law to be applied herein.

Member Schaumber would reverse the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act at the William Penn facility by allegedly terminating the established practice of holding meetings at the second step of the grievance procedure. The judge referred to no witness testimony on this point; his decision contains nothing more than an unsupported conclusory statement of fact. The only record evidence which arguably addresses the issue is that of Ruth Ann Pilarski. Pilarski first said that, after the contract expired, the Respondent simply returned grievances "denied" and never held grievance meetings. She did not say that the Respondent only departed from resolving grievances at the "earlier steps of the grievance procedure." She later said, however, that a third step grievance meeting was in fact held on at least two occasions. In light of this inconsistency and without knowing that the judge relied on Pilarski's testimony to find a violation in any event, Member Schaumber would not find it proven that the Respondent eliminated second step meetings.

Chairman Battista and Member Liebman find that Pilarski's testimony that the Respondent had departed from its prior policy of informally resolving grievances at the earlier steps of the grievance procedure, including at step two, adequately supports the judge's conclusion that the Respondent unilaterally changed the practice of meeting at the second step of the grievance process.

directly associated with violations found by the judge, we grant the General Counsel's exceptions and find the following additional violations:

(a) The Respondent violated Section 8(a)(1) by announcing and conducting the poll at Grandview Health Care.[37]

(b) The Respondent violated Section 8(a)(3) and (1) by suspending employees John Wilson and Charles Williams, and by reprimanding and suspending Cheryl Danner, discipline which preceded their unlawful discharges.

(c) The Respondent violated Section 8(a)(5) and (1) by refusing to bargain over the disciplinary policy for employees who refused to work overtime at Fayette Health Care.[38]

(d) The Respondent violated Section 8(a)(1) by telling employees at Murray Manor that they made the wrong choice by participating in the April strike.

## VI. REMEDIAL ISSUES

### *A. Corporatewide Order*

We agree with the judge that a corporatewide cease-and-desist order and notice posting is appropriate. This is the fifth in a series of cases involving the Respondent in which there is evidence that corporate officials played prominent roles in directing, approving, or knowingly failing to prevent the unlawful actions that occurred at individual facilities.[39] Specifically, the evidence here shows involvement of corporate officials in responding to the Union's information requests, in conducting an unlawful poll and withdrawing recognition from the Union at individual facilities, in handling employee grievances, and in implementing the policy of deducting health insurance premiums from former strikers.[40]

The repetition of this now-familiar pattern of unlawful actions on the part of corporate officials warrants a finding that the Respondent continues to have a proclivity to violate the Act, and that its widespread misconduct demonstrates a general disregard for its employees' Section 7 rights.[41] We find, therefore, that absent a corporatewide remedy, the Respondent remains likely to commit such unlawful actions at its other facilities against other employees. Accordingly, we will issue a single, corporatewide remedial order addressing all of the violations found.[42] We will also require the posting of two versions of the notice to employees—one to be posted at each Pennsylvania facility involved in this proceeding and at those of the Respondent's separate offices that oversee those facilities, and one to be posted at each of the Respondent's other facilities and offices nationwide, as explained in *Beverly IV*, 335 NLRB at 642–643.[43]

### *B. The General Counsel's Request for Extraordinary Remedies*

In addition to the remedies provided in the judge's recommended Order, the General Counsel requests special access for the Union to post notices and to address the employees at the Respondent's facilities in connection with organizing campaigns and representation elec-

[37] Because there is no dispute that the Respondent initiated the poll, we find it unnecessary to pass on the General Counsel's exception regarding the judge's failure to find that Barbara Crudo, who conducted the poll, was an agent of the Respondent within the meaning of Sec. 2(13).

[38] Member Schaumber dissents on this issue. The General Counsel claims that the Union sent a request to bargain on this issue on June 5, 1996, which the Respondent refused. There is in the record, however, a June 11, 2006 letter from the Respondent's administrator, Jim Fillipone, in response to the Union's June 5 letter, which states, "I am willing to bargain the mandatory overtime issue in conjunction with all other local contract issues as soon as possible. Please advise me of possible dates." Fillipone testified the Union never contacted him to provide any dates. While Fillipone also testified that he had been told by a regional official of the Respondent that he did not have to bargain on these issues because they were contractual, Fillipone did not testify that he followed that advice and the Respondent's June 11 letter appears to indicate the opposite. In any event, the state of the record does not establish that the General Counsel proved this allegation by a preponderance of the evidence.

Chairman Battista and Member Liebman agree that the General Counsel failed to establish that the Respondent unilaterally changed its overtime policy when it disciplined two employees for refusing to work overtime at the Fayette Health Care facility, as discussed in sec. IV,E, above, but they find that the Respondent violated Sec. 8(a)(5) by expressly refusing the Union's 1996 request to bargain concerning overtime, which was made at a time when there was no contract in effect. The Respondent's suggestion that discussions on the immediate request to bargain about mandatory overtime be deferred for overall contract negotiations fails to address the Union's request for bargaining as to matters involving pending grievance issues.

[39] See *Beverly Health & Rehabilitation Services (Beverly IV)*, 335 NLRB 635 (2001), enfd. in part 317 F.3d 316 (D.C. Cir. 2003); *Beverly California Corp. (Beverly III)*, 326 NLRB 232 (1998), enfd. in part and remanded 227 F.3d 817 (7th Cir. 2000); *Beverly California Corp. (Beverly II)*, 326 NLRB 153 (1998); enfd. 227 F.3d 817 (7th Cir. 2000); *Beverly Enterprises (Beverly I)*, 310 NLRB 222 (1993), enf. denied in part sub nom. *Torrington Extend-A-Care Employees Assn. v. NLRB*, 17 F.3d 580 (2d Cir. 1994).

[40] Corporate officials involved in unfair labor practices here include the vice president for labor and employment, the vice president of operations for central and eastern Pennsylvania, and the labor relations manager.

[41] The Respondent contends that its corporate-level efforts to ensure compliance with the Act have steadily reduced the number of unfair labor practices it has been found to have committed over time. However, the figures the Respondent cites to support this contention do not include the unfair labor practices found in either *Beverly IV* or this proceeding.

[42] Both the District of Columbia and the Seventh Circuits have enforced corporatewide remedies against the Respondent in *Beverly III* and *IV*. See supra, fn. 30.

[43] The U.S. Court of Appeals for the Seventh Circuit has affirmed this type of remedy. See *Beverly California Corp. v NLRB,* 227 F.3d at 846–847.

tions for a period of 2 years. Because this case involves no organizing campaigns or representation proceedings, we find that such extraordinary remedies are not appropriate.

The General Counsel also requests that the Respondent be required to reimburse the Agency for litigation expenses incurred in establishing that the Respondent is a single employer, asserting that the Respondent's position to the contrary has been previously rejected by the Board in *Beverly III* and is patently meritless on its face. The Board denied a similar request by the General Counsel in *Beverly IV*, but at the same time noted that the Respondent's single-employer status had been exhaustively litigated in three prior Board proceedings and warned that, absent significant changed circumstances, further litigation of this issue in future cases would not be warranted.[44] Because *Beverly IV* had not issued at the time this case was litigated, the Respondent was not yet on notice of the Board's decision. Thus, we find that an award of litigation costs is not appropriate here, and deny the General Counsel's request.

ORDER

The Respondent, Beverly Health and Rehabilitation Services, Inc., Ft. Smith, Arkansas, its Operating Divisions, Regions, Groups, wholly owned subsidiaries, and individual nursing homes, and each of them, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening applicants that they will not be hired unless they agree in advance to cross a picket line in the event of a strike.

(b) Threatening employees with a reduction of hours or job loss for participating in a strike.

(c) Informing employees that they will not be given full-time hours because of their participation in a strike.

(d) Informing employees that certain rules of conduct apply only to former strikers.

(e) Informing employees that union members will not be permitted inside its facilities during their off-duty hours, and denying such access to off-duty union members.

(f) Engaging in unlawful surveillance, including videotaping, of employees who are engaged in protected activity.

(g) Instructing employees to remove prounion insignia from their clothing.

(h) Disciplining and discharging employees for engaging in protected, concerted activities.

(i) Refusing to accommodate the scheduling and workplace needs of employees who engage in protected activities.

(j) Unilaterally implementing changes in employees' terms and conditions of employment, and refusing to bargain over such changes.

(k) Refusing to recognize and bargain with Service Employees International Union, Local 585, CLC as the exclusive collective-bargaining representative of the service and maintenance employees working at Grandview Health Care.

(l) Refusing to make COPE deductions and remittances, and refusing to accept and process grievances at Grandview Health Care.

(m) Refusing to recognize and bargain with District 1199P, Service Employees International Union, CLC as the exclusive collective-bargaining representative of the licensed practical nurses working at the Mt. Lebanon facility.

(n) Polling employees for purposes of determining union support where there are unremedied unfair labor practices.

(o) Refusing to provide the Union, upon request, with information relevant and necessary for the proper performance of its duties as the collective-bargaining representative of employees.

(p) Refusing to adequately respond to information requests by the Union.

(q) Withdrawing recognition from the Union after committing unfair labor practices that are likely to cause loss of union support among employees.

(r) Refusing to hold grievance meetings at the second step of the procedure.

(s) Reducing the hours of employees who engage in concerted activities.

(t) Failing to pay employees for time lost due to investigatory suspensions because of their protected activities.

(u) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer full reinstatement to their former jobs to John Wilson at Beverly Manor of Monroeville; Margaret Moore at Haida Manor; Joyce Kircher at Meadville Care Center; Rose Girdany at Mt. Lebanon Manor; Michelle Weaver and Ruth Ann Pilarski at William Penn Nursing Center; Charles Williams at Beverly Manor of Lancaster; and Cheryl Danner at Camp Hill Care Center or, if those jobs

[44] The Respondent did not challenge the Board's finding regarding its single-employer status on appeal in *Beverly III*. Nevertheless, the circuit court agreed with the Board's finding that the evidence establishing the Respondent's single-employer status was overwhelming. See *Beverly California Corp. v. NLRB*, 277 F.3d at 828.

no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights of privileges previously enjoyed.

(b) Within 14 days from the date of this Order, remove from its files any reference to the Respondent's unlawful discharges of the above-named employees, and within 3 days thereafter notify the affected employees in writing that this has been done and that the unlawful action will not be used against them in any way.

(c) Make John Wilson, Margaret Moore, Joyce Kircher, Rose Girdany, Michelle Weaver, Ruth Ann Pilarski, Charles Williams, and Cheryl Danner whole for any loss of earnings and other benefits suffered as a result of the Respondent's discrimination against them, to be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline issued to Josie Belice and John Wilson at Beverly Manor of Monroeville; Charles Williams at Beverly Manor of Lancaster; Cheryl Danner at Camp Hill Care Center; Leatha Smith at Meadville Care Center; Amiee Miller and Sheila Oakes at Meyersdale Manor; Jeri Tagg at Murray Manor; Ann Marie Daubert, Tina Brown, Shannon Flickinger, Antoinette Bainbridge, Samantha Yohe, and Susan Spiess at York Terrace Nursing Center and, within 3 days thereafter notify each of these employees in writing that this has been done, and that the unlawful action will not be used against him or her in any way.

(e) Make Amiee Miller, Sheila Oakes, Ann Marie Daubert, Tina Brown, Shannon Flickinger, Antoinette Bainbridge, Samantha Yohe, and Susan Spiess whole for any loss of earnings and other benefits suffered as a result of their unlawful suspensions, in the manner prescribed in *F. W. Woolworth Co.* and *New Horizons for the Retarded*, supra.

(f) Make Rickie Piper at Franklin Care Center whole for any loss of earnings and other benefits resulting from an unlawful reduction of her work hours because of her union activities, in the manner prescribed in *F. W. Woolworth Co.* and *New Horizons for the Retarded*, supra.

(g) Upon request, recognize and bargain with Service Employees International Union, Local 585, CLC as the exclusive collective-bargaining representative of all Grandview Health Care employees in the appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement. The unit is:

> All full-time and regular part-time service and maintenance employees including nursing assistants, housekeepers, dietary aides, cooks, laundry aides, unit clerks and floor maintenance and activity aides employed at Grandview, excluding all other employees, including casual and temporary employees, guards and supervisors as defined in the Act.

(h) Upon request, recognize and bargain with District 1199P, Service Employees International Union, CLC as the exclusive collective-bargaining representative of all Mt. Lebanon Manor licensed practical nurses, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement. The unit is:

> All full-time and regular part-time licensed practical nursed employed at Mt. Lebanon, excluding service and maintenance employees, charge nurses, business office clerical employees, guards, professional employees and supervisors as defined in the Act and as certified by the Board in Case 6–RC–10079.

(i) On the Union's request, provide any information that is relevant and necessary to the Union's statutory duties and responsibilities as the collective-bargaining representative of the Respondent's employees.

(j) On the Union's request, rescind all unilateral actions found to have been unlawfully taken here and make employees adversely affected by such actions whole for any loss of earnings and other benefits suffered as a result of such changes.

(k) Provide the Union and its appropriate Local Unions, as the exclusive representative of the Respondent's unit employees, with notice and an opportunity to bargain with respect to any prospective changes in rates of pay, wages, hours, and other terms and conditions of employment.

(l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide 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.

(m) Within 14 days after service by the Region, post at each of the individual nursing homes in Pennsylvania involved in this proceeding and the Respondent's associated offices overseeing these Pennsylvania facilities cop-

ies of the attached notice marked "Appendix A."[45] These individual facilities include the following: Beverly Manor of Monroeville, Clarion Care Center, Fayette Health Care (Uniontown), Franklin Care Center (Waynesburg), Grandview Health Care (Oil City), Haida Manor (Hastings), Meadville Care Center, Meyersdale Manor, Mt. Lebanon Manor, Murray Manor (Murraysville), Richland Manor (Johnstown), William Penn Nursing Center (Lewistown), Beverly Manor of Reading, Beverly Manor of Lancaster, Blue Ridge Haven Convalescent Center (Camp Hill), Caledonia Manor (Fayettsville), Camp Hill Care Center, Carpenter Care Center (Tunkhannock), and York Terrace Nursing Center (Pottsville). The appropriate copies of each notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such facility at any time since November 1995.

(n) Within 14 days after service by the Region, post at each of its other nursing homes and corporate offices copies of the attached notice marked "Appendix B."[46] The appropriate copies of each notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such facility at any time since November 1995.

(o) 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.

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

## APPENDIX A

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

This notice has been posted as a result of a long series of cases brought by various unions and individuals against Beverly before the National Labor Relations Board. In these cases, the NLRB, based on Beverly's recurring violations of the National Labor Relations Act, issued an order requiring Beverly to cease and desist from committing such unlawful conduct, not only at the nursing homes that were involved in the proceedings, but also at all other Beverly nursing homes and offices. The NLRB's Order also requires Beverly to provide backpay, reinstatement, and other relief to all employees who were adversely affected, and to post and abide by a notice of these requirements at all Beverly nursing homes nationwide.

Specifically, the NLRB has found that we violated the employee rights described below at a number of nursing homes in Pennsylvania, and that we have done so repeatedly at numerous other nursing homes.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten job applicants that they will not be hired unless they agree in advance to cross a picket line in the event of a strike.

WE WILL NOT threaten you with discharge if you participate in a strike.

WE WILL NOT inform you that certain rules of conduct apply only to former strikers, or that former strikers will not be given full-time hours.

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

[46] See fn. 45, supra.

WE WILL NOT inform you that union members will not be allowed access to our facilities during off-duty hours, or deny access to off-duty union members.

WE WILL NOT engage in unlawful surveillance of your union or protected concerted activities, including videotaping.

WE WILL NOT direct you to remove prounion insignia from your clothing.

WE WILL NOT refuse to accommodate the scheduling and workplace needs of those employees who support the Union or engage in protected activity.

WE WILL NOT reduce your work hours, or discipline or discharge you for engaging in protected, concerted activities.

WE WILL NOT change the terms and conditions of employment without providing the Union with an opportunity to bargain about the proposed changes.

WE WILL NOT refuse to recognize and bargain with Local 585 as the exclusive collective-bargaining representative of the service and maintenance employees working at Grandview Health Care.

WE WILL NOT refuse to make COPE deductions and remittances, or refuse to accept and process grievances.

WE WILL NOT poll employees for purposes of determining union support at facilities where there are unremedied unfair labor practices.

WE WILL NOT refuse to recognize and bargain with District 1199P, Service Employees International Union, CLC as the exclusive collective-bargaining representative of the licensed practical nurses at Mt. Lebanon Manor.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary for the proper performance of its duties as the collective-bargaining representative of employees, when the Union requests such information.

WE WILL NOT refuse to adequately respond to information requests by the Union.

WE WILL NOT withdraw recognition from the Union after committing unfair labor practices that are likely to cause the Union to lose support.

WE WILL NOT refuse to hold grievance meetings at the second step of the procedure.

WE WILL NOT refuse to pay employees for time lost due to investigatory suspensions because of their protected activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to their former jobs to John Wilson at Beverly Manor of Monroeville; Margaret Moore at Haida Manor; Joyce Kircher at Meadville Care Center; Rose Girdany at Mt. Lebanon Manor; Michelle Weaver and Ruth Ann Pilarski at William Penn Nursing Center; Charles Williams at Beverly Manor of Lancaster; and Cheryl Danner at Camp Hill Care Center or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights of privileges previously enjoyed.

WE WILL make John Wilson, Margaret Moore, Joyce Kircher, Rose Girdany, Michelle Weaver, Ruth Ann Pilarski, Charles Williams, and Cheryl Danner whole for any loss of earnings and other benefits resulting from their discharges, less any net interim expense, plus interest.

WE WILL make Amiee Miller and Sheila Oakes at Meyersdale Manor; and Ann Marie Daubert, Tina Brown, Shannon Flickinger, Antoinette Bainbridge, Samantha Yohe, and Susan Spiess at York Terrace; whole for any loss of earnings and other benefits resulting from their unlawful suspensions, 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 discharges of John Wilson, Margaret Moore, Joyce Kircher, Rose Girdany, Michelle Weaver, Ruth Ann Pilarski, Charles Williams, and Cheryl Danner; and the unlawful suspensions of Amiee Miller, Sheila Oakes, Ann Marie Daubert, Tina Brown, Shannon Flickinger, Antoinette Bainbridge, Samantha Yohe, Susan Spiess, and Rickie Piper and, WE WILL, within 3 days thereafter, notify each of these employees in writing that this has been done and that the unlawful action will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline issued to Josie Belice at Beverly Manor of Monroeville; Leatha Smith at Meadville Care Center; Jeri Tagg at Murray Manor and, WE WILL, within 3 days thereafter, notify each of these employees in writing that this has been done and that the unlawful action will not be used against them in any way

WE WILL make Rickie Piper at Franklin Care Center whole for any loss of earnings and other benefits resulting from an unlawful reduction of her work hours because of her union activities, less any net interim earnings, plus interest.

WE WILL, on request, recognize and bargain with District 1199P, Service Employees International Union, as the exclusive collective-bargaining representative of employees at Mt. Lebanon Manor, and with Local 585 as the exclusive collective-bargaining representative of employees at the Grandview facility, in the appropriate

units, described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if understandings are reached, embody those understanding in a signed agreement.

> All full-time and regular part-time service and maintenance employees including nursing assistants, housekeepers, dietary aides, cooks, laundry aides, unit clerks and floor maintenance and activity aides employed at Grandview, excluding all other employees, including casual and temporary employees, guards and supervisors as defined in the Act.
>
> All full-time and regular part-time licensed practical nurses employed at Mt. Lebanon, excluding service and maintenance employees, charge nurses, business office clerical employees, guards, professional employees and supervisors as defined in the Act and as certified by the Board in Case 6–RC–10079.

WE WILL, on request, provide any information to the Union that is relevant and necessary to its statutory duties and responsibilities as the collective-bargaining representative of our employees.

WE WILL, on request, rescind all unilateral actions found to have been unlawfully taken and make any employees adversely affected by such actions whole for any loss of earnings and other benefits suffered as a result of such changes.

WE WILL provide the Union and its appropriate Local Unions notice and an opportunity to bargain over any prospective changes in hours, wages, and other terms and conditions of employment.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC.

## APPENDIX B

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

This Notice has been posted as a result of a long series of cases brought by various Unions and individuals against Beverly before the National Labor Relations Board. In these cases, the NLRB, based on Beverly's recurring violations of the National Labor Relations Act, issued an order requiring Beverly to cease and desist from committing such unlawful conduct, not only at the nursing homes that were involved in the proceedings, but also at all other Beverly nursing homes and offices. The NLRB's Order also requires Beverly to provide backpay, reinstatement, and other relief to all employees who were adversely affected, and to post and abide by a notice of these requirements at all Beverly nursing homes nationwide.

Specifically, the NLRB has found that we violated the employee rights described below at a number of nursing homes in Pennsylvania, and that we have done so repeatedly at numerous other nursing homes.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten job applicants that they will not be hired unless they agree in advance to cross a picket line in the event of a strike.

WE WILL NOT threaten you with discharge if you participate in a strike.

WE WILL NOT, inform you that certain rules of conduct apply only to former strikers, or that former strikers will not be given full-time hours.

WE WILL NOT, if you are represented by a union, inform you that you will not be allowed access to our facilities during off-duty hours, or deny you access to facilities.

WE WILL NOT engage in unlawful surveillance of your union or protected concerted activities, including videotaping.

WE WILL NOT direct you to remove prounion insignia from your clothing.

WE WILL NOT refuse to accommodate the scheduling and workplace needs of those employees who support the Union or engage in protected activity.

WE WILL NOT reduce your work hours, or discipline or discharge you for engaging in protected, concerted activities.

WE WILL NOT, if you are represented by a union, change the terms and conditions of employment without providing the Union with an opportunity to bargain about the proposed changes.

WE WILL NOT, if you are represented by a union, refuse to recognize and bargain with the Union as the exclusive bargaining representative of employees, or refuse to make COPE deductions and remittances.

WE WILL NOT, if you are represented by a union, refuse to accept and process grievances according to the agreed-upon procedures.

WE WILL NOT poll employees for purposes of determining union support at facilities where there are unremedied unfair labor practices.

WE WILL NOT, if you are represented by a union, refuse to provide the Union with information that is relevant and necessary for the proper performance of its duties as the collective-bargaining representative of employees, when the Union requests such information.

WE WILL NOT, if you are represented by a union, refuse to adequately respond to information requests by the Union.

WE WILL NOT, if you are represented by a union, withdraw recognition from the Union after committing unfair labor practices that are likely to cause the Union to lose support.

WE WILL NOT refuse to pay employees for time lost due to investigatory suspensions because of their protected activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind all the discriminatory discharges, suspensions, and other actions we took against employees for their union activity; WE WILL rescind all the unilateral changes in terms of employment and working conditions we made without giving the Union notice and opportunity to bargain; WE WILL, within 14 days from the date of the Board's order, offer each of the employees who were affected by this discrimination or by these unilateral changes full reinstatement to their former jobs or their former terms of employment, without prejudice to their seniority of other rights or privileges previously enjoyed.

WE WILL make each of these employees whole, with interest, for any loss of earnings and other benefits resulting from our unlawful actions.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discriminatory discharges, suspensions, or other actions affecting these employees; WE WILL, on request, recognize and bargain with the Union as the collective-bargaining representative of employees; WE WILL, on request, provide any information to the Union that is relevant and necessary to its statutory duties and responsibilities as the collective-bargaining representative of our employees; WE WILL, provide the Union an opportunity to bargain over any prospective changes in hours, wages, and other terms and conditions of employment.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC.

*Julie R. Stern, Esq.,* for the General Counsel.

*Hugh Reilly, Esq.,* of Fort Smith, Arizona, *Bruce D. Bagley, Esq.,* of Harrisburg, Pennsylvania, and *Martin J. Saunders, Esq.* and *Steven I. Farbman, Esq.,* of Pittsburgh, Pennsylvania, for the Respondents.

## DECISION

### STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. Upon charges filed on April 11, 1996, and numerous additional and amended charges filed thereafter, by District 1199P, Service Employees International Union, AFL–CIO, CLC, Service Employees International Union, Local 585, AFL–CIO, CLC, and Pennsylvania Social Services Union Local 668 a/w Service Employees International Union, AFL–CIO (District 1199P, Local 585 and Local 668), respectively, and, collectively, as the Unions, and by Mary Myers and Jeri L. Tagg, individuals, against Beverly Health and Rehabilitation Services Inc., its operating regional offices, wholly-owned subsidiaries and individual facilities and each of them and/or its wholly-owned subsidiary Beverly Enterprises–Pennsylvania, Inc., and its individual facilities and each of them (the Respondents), the General Counsel of the National Labor Relations Board (the Board), by the Regional Director for Region 6, issued an order consolidating cases and consolidated complaint dated March 4, 1997, as thereafter amended and further consolidated with additional cases, alleging violations by the Respondents of Section 8(a)(5), (3), and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act) at 19 of their Pennsylvania facilities. The Respondents, by their answers, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Franklin, Harrisburg, Johnstown, Reading, and Pittsburgh, Pennsylvania, on various dates between July 28, 1997, and October 22, 1998, at which the General Counsel and the Respondents were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record[1] in these cases, and from my observation of the witnesses, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Beverly Health and Rehabilitation Services, Inc. (BHRI) and its wholly-owned subsidiary Beverly Enterprises–Pennsylvania, Inc. (BE–P), are part of a corporate group which operates some 950 nursing homes throughout the United States. The Respondents run homes in Pennsylvania, including those at issue here, and derive gross revenues therefrom in excess of $500,000. During the 12-month period ending September 30, 1995, a representative timeframe, the Respondents purchased and received at each of their Pennsylvania facilities involved herein, products, goods, and materials valued in excess of $5000, which were sent directly from points located outside the Com-

[1] The General Counsel's unopposed motion to correct the transcript of proceedings is granted.

monwealth of Pennsylvania. I find that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Unions are, each, labor organizations within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

*A. Background*

The instant matter is the fifth in a series of cases concerning the various Beverly nursing homes across the country, which has resulted, thus far, in a United States Court of Appeals decision, three Board decisions and an administrative law judge's decision over the past 10 years[2] in which truly massive violations of Section 8(a)(5), (3), and (1) of the Act were found. The cases here concern, essentially, events following the November 30, 1995 expiration of collective-bargaining agreements at 18 of the Respondents' 20 organized facilities in Pennsylvania,[3] covering units of service and maintenance employees, including certified nursing assistants (CNAs) and, in some cases, units of licensed practical nurses (LPNs), and an ensuing strike from April 1 to April 4, 1996, at 15 facilities.[4] The principal issues in these cases are whether the Respondents took retaliatory actions, including discharges, against employees because they participated in the strike or otherwise supported the Unions; refused to provide information properly requested by the Unions; made unilateral changes in the terms and conditions of employment of their bargaining unit employees and unlawfully withdrew recognition of the bargaining representative of the employees in two units at two of their facilities.

*B. Facts*[5] *and Conclusions*

1. The alleged violations of Section 8(a)(1) of the Act

Following the strike, found by Judge Wallace in the *Beverly IV* cases to have been an unfair labor practice strike, in mid to late April 1996, certified nursing assistant Rickie Piper spoke with Loretta Bosworth, the assistant director of nursing (ADON) at the Franklin facility. According to Piper, who had participated in the strike and engaged in picketing of the facility, she asked Bosworth why her workdays had been reduced from 10 to 9, per 2-week period, while less senior people did not suffer any reduction. Piper testified that Bosworth, in response, stated that those who had crossed the picket line would not lose workdays. Bosworth, in her testimony, stated that she could not recall a specific conversation with Piper concerning this subject matter. Piper impressed me as a truthful witness. Based upon her essentially uncontradicted testimony, I find that the Respondents, through statutory Supervisor Bosworth, violated Section 8(a)(1) of the Act by threatening employees who participated in the strike with reduced work hours.

According to the uncontradicted testimony of Linda Cochran, a cook at the Meyersdale facility and a member of the service and maintenance employee bargaining unit there, she was approached about a week before the strike by the facility administrator, Michael Walker, and questioned about what she thought would happen concerning the then-impending work stoppage. Walker told Cochran that if she went on strike, she "probably wouldn't have a job" when she came back. He further stated that she, Cochran, should not think that she "could just walk back in the door," as that was a matter for the courts to decide. During the conversation, Walter also stated that the employee "might be replaced," but, in addition, said, repeatedly, that Cochran would not have a job following the strike. Accordingly, based on Cochran's uncontradicted testimony, I find that the Respondents, through Administrator Walker, violated Section 8(a)(1) of the Act by threatening employees with job loss if they engaged in a strike.

Jeri Tagg worked in the laundry and housekeeping department at the Murray Manor facility, from August 1994 until December 1996, at which time she became a certified nursing assistant. Tagg, who was not scheduled to work during the strike, participated in strike activities and picketed at the facility. This employee, who had worked part time before the work stoppage, saw her supervisor, Beverly Magill, immediately following the strike and asked if there was a full-time position open for her. Tagg testified that Magill, in response, stated, "no," as Tagg had "made the wrong fucking choice" regarding the strike. Magill, in her testimony, confirmed that a conversation with Tagg occurred after the strike, but she denied making the remark attributed to her by the employee. As I found

[2] See *Beverly Enterprises*, 310 NLRB 222 (1993), enfd. in relevant part sub nom. *Torrington Extend-A-Care Employee Assn. v. NLRB*, 17 F.3d. 580 (2d. Cir. 1994) (*Beverly I*); *Beverly Enterprises*, 326 NLRB 153 (1998) (*Beverly II*); *Beverly Enterprises*, 326 NLRB 232 (1998) (*Beverly III*); *Beverly Health & Rehabilitation Services, Inc., et al.*, JD–204–97 (1997) (*Beverly IV).*

[3] At the Grandview and Lancaster facilities, the labor contracts expired on December 31, 1994.

[4] The Respondents urge that prosecution of these cases is barred by the Board's rulings in *Jefferson Chemical Co.,* 200 NLRB 992 (1972), and *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978), as Cases 6–CA–27873, et al., the *Beverly IV* cases, involved the same nursing home facilities, and the principal unfair labor practice allegations in the two sets of cases arose from the same 3-day strike. Particularly since the *Beverly IV* litigation was ongoing at the time the initial complaint in this, the *Beverly V* matter, issued, it is the Respondents' view that, by separately litigating these cases, the General Counsel has engaged in "impermissible piecemeal litigation." I disagree. By instituting the *Beverly V* cases, the General Counsel has not sought to relitigate any matters whatsoever which were previously litigated under the same or a different provision of the Act. Moreover, counsel for the General Counsel, as argued in its brief, "made a good faith effort to consolidate" the *Beverly IV* and *Beverly V* cases by moving before Administrative Law Judge Robert T. Wallace, who heard and decided the *Beverly IV* cases, that Cases 6–CA–28276, et al. be joined with those cases. As Judge Wallace denied the motion, the General Counsel was then required separately to litigate the two groups of cases. The decision to so proceed in these circumstances can hardly be viewed as an "arbitrary abuse of discretion," especially since the Board does not apply "a blanket rule in favor of consolidation." See *Unbelievable, Inc.*, 324 NLRB 1225 (1997).

[5] The fact-findings contained herein are based upon a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth, infra.

Magill's general denial less believable than the detailed version of the conversation offered by Tagg, who appeared to be an honest and forthright witness, I find, based upon Tagg's testimony, that the Respondents, through statutory Supervisor Magill, the laundry and housekeeping supervisor at Murray Manor, violated Section 8(a)(1) of the Act by informing an employee that she would not be given full-time hours because of her participation in the strike.

According to the uncontradicted testimony of Margaret Moore, when she interviewed for a CNA position in March 1996 at the Haida Manor facility, she was told by statutory Supervisor Nancy Piatek, the ADON, that she, Moore, would not be hired unless she agreed to cross the picket line in the event of a strike. Also at Haida Manor, according to the uncontradicted testimony of Cathy Bobby, a then-recent hire as a part-time casual CNA, she, Bobby, during the strike, was told by Piatek to report to work on April 3, 1996, at some time during the day for just an hour, any hour, "it did not matter when." Piatek further informed Bobby that, if she did not come to work at all, she would no longer have a position at the facility. Based upon the credible, uncontradicted testimony of Moore and Bobby, I find that, at Haida Manor, the Respondents, through supervisor Piatek, violated Section 8(a)(1) of the Act by threatening an employee that she would not be hired if she did not agree, in the event of a strike, to cross the picket line, and by threatening an employee with discharge if she honored the strike.

During the period preceding the April 1–4, 1996 strike, Anthony Molinaro, the administrator of the Mt. Lebanon facility, conducted meetings of the nursing staff at which he stated that if there were a strike, the employees could be replaced. In addition, CNA Patricia Albano testified, about a week before the strike, Molinaro told a group of unit employees who were working at a nurse's station in the facility that, if they went on strike, they "would never get [their] jobs back and never be allowed back in the facility." Molinaro, in his testimony, denied making the latter remark. After the strike, on April 6, following Albano's return to work, it is undisputed that Molinaro told her, during the course of a telephone conversation, "to be careful" since Albano "was up to suspension in [her] write-ups" and he, Molinaro, did not want her "to lose her job." Based upon my observation of their demeanor as witnesses, I found Albano more credible than Molinaro and, where their versions of conversations differ, I have relied upon Albano's testimony. Accordingly, I find that the Respondents, by Molinaro, violated Section 8(a)(1) of the Act by threatening employees, before the strike, with job loss if they participated in a strike. On the other hand, I am unwilling to conclude that there was illegality in his poststrike remark to Albano that, in view of the status of her disciplinary record, she should be careful so as to avoid termination under the existing progressive disciplinary system, a comment more suggestive of innocent concern than anything else.

At the William Penn facility, employees were permitted access to the premises during their off-duty hours and they frequently chose to visit at such times. However, according to the very vague and uncorroborated testimony of Director of Nursing (DON) Margaret Weaver, management decided late in October 1996 that such visits would be curtailed, "or at least monitored," following the visit of two CNAs who, while there, allegedly upset two of the residents by discussing union business with them. On October 31, Halloween, CNAs Cindy Burk, and Luann Riden, union members, dressed up in Halloween costumes and went to visit residents at the nursing home during the CNAs' off-duty hours, to show their costumes. They were approached in a hall by Director of Staff Development Hope Brubaker, who told them to leave the building. Nevertheless, the CNAs continued to visit with residents and Brubaker followed them, telling them to leave. When the employees asked why, Brubaker, according to the undisputed record evidence, told them that the administrator, Lee Miller, had instructed that an employee who was not working was "not allowed in the building if you're a union member." At trial, Brubaker testified that she made clear to Burke and Riden that the facility would "be treating any union person who is not on duty the same way."

Based upon the above, I find that the Respondents violated Section 8(a)(1) of the Act by informing employees at the William Penn facility that union members were no longer permitted in the building during their off-duty hours, and by denying normal access to off-duty employees who were members of District 1199P. Whatever, if any, problem may have occurred during the visit of two other employees some 10 days earlier, did not create justification for denying or limiting access to all union members, and only union members, contrary to the previous free access policy.[6]

The uncontradicted record evidence shows that on April 4, 1996, at Haida Manor, the facility's security guards videotaped the employees who had engaged in the April 1 to 4 strike and who were, on April 4, approaching the facility and attempting to return to work. The videotaping occurred in the total absence of violence or disruption of any kind. On June 2, between noon and 6 p.m., some 25 to 35 off-duty employees picketed in front of, near but not on, facility property. Again, it occurred absent any violence or disruption. During the entire course of the picketing, an individual sat in the facility administrator's car[7] and videotaped the employees as they walked back and forth.

The Respondents have offered no evidence tending to justify the videotaping. In the circumstances, the conclusion is mandated that, by engaging in that activity, as set forth above, on April 4 and June 2, 1996, the Respondents engaged in intimidating conduct amounting to unlawful surveillance of their employees' protected activities, in violation of Section 8(a)(1) of the Act.[8]

At the Meadville facility, prior to the strike, employees commonly wore buttons and pins of various types, including union insignia, attached to their clothing while at work. Shortly after the strike, according to the testimony of Leatha Smith, a CNA, ADON Judy Coleman asked Smith to take her union pin off, and the employee did so. CNA Joyce Kircher testified that,

[6] See *Ring Can Corp.*, 303 NLRB 353, 363 (1991).

[7] The administrator is the highest-ranking onsite official at each home.

[8] See *Brunswick Hospital Center,* 265 NLRB 803 (1982).

on April 10, 1996, Coleman told her that "I have to ask you to remove your union button." When Kircher asked what would happen if she did not comply with that directive, Coleman told her that "I was told that you would have to leave." Kircher then removed the insignia. Coleman, in her testimony, stated that, after she was instructed by the facility administrator to ask employees wearing the badge "Beverly Law Breaker" to remove it, because the message was upsetting to the facility's residents, she asked an employee to remove such a pin. This occurred "around the time of the work stoppage." Coleman could not recall the name of the employee she spoke to, but testified that she had one conversation, only. Both Smith and Kircher testified that neither had ever worn a pin containing the "Beverly Law Breaker" designation.

Coleman's vague testimony concerning this matter did not, in any event, challenge the credible, uncontradicted accounts of events offered by Smith and Kircher. Their testimony shows that the Respondents, having theretofore permitted employees to wear buttons and pins at work, including union insignia, instructed two employees, after the strike, to remove their prounion buttons. As only union insignia was prohibited, and in the absence of evidence that the badges worn by Smith and Kircher were offensive, I find that the Respondents, by those directives, violated Section 8(a)(1) of the Act. The Respondents further violated the Act at this facility when, on June 16, 1996, according to the uncontradicted testimony of CNA Julie Snyder, she was told by supervisor Wilma Ishman-Heime that certain rules of conduct applied only to employees who had engaged in the strike.

At the Lancaster facility, too, employees had been allowed to wear pins and buttons, including prounion stickers. However, according to the testimony of Charles William, a cook, in December 1995, he was called to the office of the administrator, Larry Ayres, who told Williams, a shop steward, that employees had to remove all union insignia. Williams so informed other employees. Although the Respondents admitted this matter in their pleadings, Ayres testified at trial that the only button he had ever prohibited was one stating, "Danger, Short Staffing." In light of the pleadings, as supported by Williams' credible testimony, I find that the Respondents violated Section 8(a)(1) of the Act when, in December 1995, contrary to past practice, they prohibited Lancaster employees from wearing union buttons and stickers.[9]

2. The alleged violations of Section 8(a)(3) of the Act—the discharges and other disciplines—and the suspensions allegedly in violation of Section 8(a)(1) of the Act

Josie Belice has been employed as a CNA at the Monroeville facility since 1985, and she has been Local 1199P's chapter president there since 1986. Belice participated in the April 1–4, 1996 strike, and she engaged in picketing of the facility. She returned to work for the 11 p.m. to 7 a.m. shift on the evening of April 5, and, that night, she had a conversation in a hall with two other CNAs who were returning strikers, and her remarks were overheard by the shift supervisor, William Dickun. With apparent reference to the many replacement employees who were working in the building, including two on her shift, Belice stated that the next time there was a strike she, Belice, would come back as a "scab" since "they don't have to do any work." Dickun then told her that the next time he heard that word, he would write Belice up. Thereafter, Belice did not use the word, "scab."

Despite Dickun's clearly expressed intention to let the matter rest there, Belice, a few days later, received a written disciplinary write-up, dated April 6, for "making malicious statements about another associate," contrary to the Beverly work rules. At a disciplinary meeting, Director of Nursing (DON) Bonnie Forney told Belice that she would not tolerate the employees calling others by malicious and derogatory names. Belice protested, stating that "scab" was neither malicious nor derogatory, but a dictionary word. Moreover, Belice stated, she had not called anyone a scab but had merely used the word in conversation.

In light of Belice's union activism and her participation in the strike, the Respondents' knowledge of same and their strong antiunion animus, as demonstrated in this and in the *Beverly I, II, III,* and *IV* cases, the General Counsel has established a prima facie case showing that the employee's union activities were a motivating factor in the Respondents' decision to discipline her. In my view, the Respondents have not shown that the same action would have been taken, even absent Belice's protected conduct.[10] Thus, Dickun, the management official who overheard the comment at issue, regarded the matter as trivial, as shown by his testimony that he told the employee to "knock it off" and "that was really the end of it." In line with the tenor of his testimony, I note that the once stated word, scab, was uttered in private conversation, and was not directed at anyone, and, in all the circumstances, to have concluded that it was a "malicious statement" about another associate was, on the Respondents' part, quite a stretch in logic, suggesting, on its face, that the Respondents acted on the basis of an agenda other than the stated one. I conclude that Belice was disciplined due to her union activities, in violation of Section 8(a)(3) of the Act.

Also at Monroeville, the Respondents, on September 27, 1996, discharged LPN John Wilson, employed there since 1986, and, at the time of the strike, the vice president of the chapter who, as such, frequently filed grievances on behalf of unit employees with management officials. Wilson, who participated in the strike, was not recalled until August, at which time he worked on an occasional basis, approximately 2 days per week. DON Forney met with Wilson on September 27 and advised him that he was being discharged because, some 8 or 9 days earlier, he had failed to administer a medication to a resident, and failed to record that fact in facility books, constituting

[9] Williams also testified that, in the same month, an announcement was made over the facility's public address system informing employees that they would no longer be allowed to wear union logos on dress down days. As Williams' testimony in this regard was somewhat confused, and was denied by Ayres, I find that the General Counsel has not sustained its burden and that the corresponding complaint allegation should be dismissed.

[10] *Wright Line,* 281 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

resident neglect and falsification of records. She handed to him the disciplinary action form, filled out before he got there, without obtaining his version of events. At trial, Wilson testified that he had no recollection of an incident with the resident in question, Feldmeier, but stated that, had he not given her her medication, he would have duly recorded that fact. The writeup provided to Wilson noted two previous disciplines issued to him, one, several days before the onset of the strike, for insubordination, namely, refusal to remove his union hat when directed to do so by a management official, and the other, more than a year before the alleged Feldmeier incident, for a remark made about the ADON which he, Wilson, viewed as a joke and which the Respondents viewed as a "false or misleading statement" about an associate. Under the terms of the expired collective-bargaining agreement, due to the age of the latter incident, it was to be disregarded.[11]

Forney testified that she decided to discharge Wilson after speaking to the resident and reviewing the statements of others who had interviewed Feldmeier. Forney opted to take that action without speaking to Wilson or in any way attempting to learn his version of events. While the discharge writeup referred to Feldmeier as alert and oriented, there is credible record evidence that she, in fact, was confused and suffered from memory lapses.

In view of Wilson's known and very extensive union activities and the Respondents' demonstrated animus, the inference is warranted that his protected activities were a motivating factor in the decision to discharge him. Nor have the Respondents shown that they would have taken that action even absent his protected conduct. Rather, the Respondents discharged a 10-year veteran employee without in any way seeking to learn his version of what, if anything, happened when he tended to Feldmeier, based solely upon the statements of a resident not in full control of her faculties. The very manner of the investigation suggests, in the strongest way, that the Respondents seized upon Feldmeier's statements as a pretext to mask their true, antiunion reasons for terminating Wilson's employment, in violation of Section 8(a)(3) of the Act. I so find and conclude.

At the Clarion facility, CNA Janet Crissman, a 13-year employee, has been a union delegate for some 6 or 7 years and, as such, she files grievances and attends grievance meetings with management officials. Crissman, who participated in the strike and engaged in picketing, received two written warnings in the days following her return to work on April 8. Thus, according to her uncontradicted testimony, on April 9, she received a disciplinary warning for failing that day to respond to a tabs unit, an alarm attached to a patient who is at risk of falling. In fact, she had answered the tabs unit some four or five times that morning, and found that the patient was just moving around in his bed and was not in danger. Crissman was distributing breakfast trays when the alarm went off again, and she continued to do so. Registered Nurse (RN) Supervisor Sally Doran walked toward the room of the patient in question, telling Crissman that "you should be getting that tabs unit." Crissman continued to distribute trays, assuming that Doran was answering the alarm. Crissman was given the reprimand without being afforded an opportunity to explain her actions.

The General Counsel's prima facie case of discriminatory disciplinary action, based upon Crissman's union activities, the Respondents' knowledge of same and their overwhelming antiunion animus, stands unrefuted and, in addition, is further buttressed by the surrounding circumstances. Despite Crissman's many years of service at the facility, during which time she had never been disciplined for a patient care matter, the Respondents, facing questionable circumstances, rushed to discipline her without seeking to obtain her version of events, further suggesting that antiunion animus, not patient care concerns, motivated the disciplinary action. The Respondents thereby violated Section 8(a)(3) of the Act.

I further find that the April 19 reprimand issued to Crissman, for failure to perform job duties related to patient care, was unlawfully motivated. Regarding this matter, Crissman testified that she had taken a patient to the bathroom at about 11 a.m. that day, just prior to the CNA's lunchbreak. Sometime after Crissman's return from lunch, she was given a written reprimand by the charge nurse, Tamayra Shreckengast, who told her that the patient had complained of a lump and, upon investigation, Shreckengast discovered dried stool on him. Again, Crissman was not given an opportunity to explain. At trial, Shreckengast testified that it was, in fact, she who found the dried stool, although she did not state when, and that, in her opinion, what she found was not consistent with an 11 a.m. toileting. Again, here, evidence of the Respondents' race to mete out discipline, without adequate investigation, serves to buttress the General's Counsel's prima facie case that the discipline was imposed in violation of Section 8(a)(3) of the Act. I so conclude.

In April 1996, Mary Myers was a licensed practical nurse, on part-time status at the Fayette facility, who worked as few as 8 hours per week. She was not scheduled to work during the strike as she had requested time off during that period and, thereafter, due to her wedding. She engaged in picketing of the facility on April 1 and 3. On April 5, Myers received a registered letter stating that she had been replaced and would not be offered immediate reinstatement but, rather, would be placed on a preferred hiring list. At trial, the facility administrator, Jim Fillipone, credibly explained that, as Myers had no set work schedule, "she just slipped through the cracks."

While I reject the General Counsel's contention that Myers was discharged, it is clear from the circumstances that the Respondents believed that she was a striker and, on that basis, she was permanently replaced. As Judge Wallace determined that the strike was an unfair labor practice strike, the Respondents' actions in permanently replacing Myers, and in refusing to reinstate her following the strike, in the belief that she was a striker, were violative of Section 8(a)(3) of the Act.

CNA Rickie Piper of the Franklin facility testified that, before the strike, she worked a full schedule of 10 days during every 2-week period. Piper, who wore union buttons and stickers to work, and passed out union leaflets outside the building, continued in those hours after the strike ended. However, she claimed, in mid-April, her work hours were reduced to 9 days

[11] The Respondents also introduced into evidence numerous writeups issued to Wilson over the years, none of which were cited in the discharge writeup.

per 2-week period. As noted, supra, Piper complained about the matter to ADON Bosworth and pointed out that less senior nonstriking employees had not had their hours reduced. Piper further testified that the change to her hours lasted for some 3 months.

At trial, the Respondents urged that Piper had not suffered a cut in hours. However, in their posthearing brief, the reduction in work time is conceded and the Respondents contend, instead, that it was due to overstaffing, an argument not supported by record evidence. In light of Bosworth's statements to Piper, as found above, that only those who had engaged in the strike were subject to a loss of workdays, and in the absence of credible evidence that Piper would have suffered the reduction even absent her extensive union activities, I conclude that Piper's hours were reduced for unlawful reasons, in violation of Section 8(3) of the Act.

It is undisputed that the Respondents discharged probationary employee Tammy Rummel, who worked at the Haida Manor facility, for failure to report to work, or call in, on her scheduled workdays during the strike, April 1 and 3, 1996. Rummel engaged in picketing at the facility on those days, and honored the strike. As probationary employees are fully entitled to the protections of the Act, I conclude that the Respondents violated Section 8(a)(3) of the Act by discharging Rummel for not working during the work stoppage.[12]

As earlier found, the Respondents unlawfully threatened probationary employee Cathy Bobby, a part-time causal CNA at Haida Manor, with discharge if she honored the strike. Indeed, as noted, ADON Piatek, during the strike, instructed Bobby to report to work for an hour on April 3, 1996, regardless of the time of day. Instead, Bobby, who had earlier worked at Haida Manor from July 1994 to October 1995, and who was rehired and returned to work there on March 4, 1996, engaged in picketing at the facility on April 3. Following her shift on March 27, she was not scheduled to work again until April 6. When she reported to work on that day, she was advised by supervisor Peg Cunningham that she, Bobby, had been permanently replaced.

Haida Manor DON Lisa Sedlemyer testified that Bobby was discharged due to scheduling difficulties created by the fact of her concurrent part-time employment at a local hospital. In this connection, I note the undisputed evidence that Bobby advised Piatek, at the time of her reemployment interview, of her hospital work, although she also stated her intent eventually to resign from that job and work exclusively at Haida. While Piatek testified that she understood that Bobby would effect such resignation before she started work at Haida Manor, Bobby did not do so. Indeed, upon her reemployment at Haida Manor, Bobby submitted to the facility her schedule of work hours at the hospital, and she was assigned work hours at the Beverly facility, accordingly. Bobby was not disciplined due to unavailability at any time.

Whatever scheduling difficulties, if any, were created because Bobby worked two part-time jobs, the Respondents were willing to tolerate the situation until Bobby joined the strike, picketed and refused, despite the threat of discharge, to abandon the strike and report to work. The timing of the firing, immediately when Bobby came to work, as scheduled, following the strike, further supports the conclusion, mandated by the General Counsel's strong prima facie case and the Respondents' failure to adduce convincing evidence that they would have taken the same action even absent Bobby's protected conduct, that the Respondents acted for unlawful reasons. I find and conclude that the Respondents, on April 6, 1996, violated Section 8(a)(3) of the Act by discharging Bobby.

Anita Selfridge, an LPN employed at Haida Manor, participated in efforts, before the strike, to organize the LPNs working at Haida Manor, despite the Respondents' position that the LPNs working there are statutory supervisors.[13] In early April 1996, she was reprimanded for failure properly to administer discipline to a CNA. The General Counsel contends that the Selfridge discipline was meted out for unlawful reasons and that, much later that year, Selfridge's employee evaluation was not as favorable as it otherwise would have been, due to the April incident. As the General Counsel's case concerning Selfridge is based entirely upon her testimony, and as I found her a wholly unreliable witness without real memory of the events about which she testified, I conclude that the General Counsel has failed to establish a prima facie case in these regards and that the corresponding complaint allegations must be dismissed.

The Respondents employ CNAs Susan Rietscha and John Katchmer at Haida Manor, Rietscha since 1990, and Katchmer since 1989. Both participated in the strike and wore union buttons and stickers to work. They each engaged in the informational picketing at the facility on June 2, 1996, and, then, later that day, reported to work. Rietscha and Katchmer worked together on June 2 and, while caring for a resident, they neglected fully to pull the privacy curtain around the patient to whom they were giving care. This fact was observed by ADON Piatek who spoke to the CNAs about their failure to comply with Federal and State regulations concerning the matter, as well as facility policy and procedure. Later in the shift, the two CNAs received written reprimands from DON Sedlemyer for their failure adequately to pull the privacy curtain that day.

Both Rietscha and Katchmer testified that, normally, the facility issues oral warnings, only, for first offense violations of the privacy rule and that the June 2 incident was, for both CNAs, a first offense violation. Nonetheless, and despite the suspicious timing of the disciplinary actions, I am not persuaded that the written warnings were issued for discriminatory reasons in light of the seriousness of the rule which, incontrovertibly, the CNAs violated, and the evidence showing that at least one other Haida Manor certified nursing assistant similarly received a written warning for a first offense violation of that rule. I conclude that the complaint allegations in this regard should be dismissed.

Margaret Moore began work for the Respondents on March 11, 1996, as a part-time casual CNA at Haida Manor. As found, supra, Moore was told during her employment interview, earlier that month, that she would not be hired unless she

[12] See *General Battery Corp.*, 241 NLRB 1166 (1979).

[13] See *Beverly Health & Rehabilitation Services v. NLRB*, Nos. 98-5160/5259 (6th Cir. April 28, 1999).

agreed to cross the picket line during the course of the then-impending strike. Moore consented to that condition, and she worked during the strike. After the work stoppage, in May, she missed 2 days of work due to illness. Moore offered doctor's excuses to her supervisor, Piatek, who told her that they were unnecessary. Thereafter, Moore presented those notes to Sedlemyer.

Later that month, Moore joined Local 585, and she began wearing union buttons to work as well as a ribbon in support of replaced strikers. On June 2, she participated in the informational picket line outside the facility. Five days later, on June 7, Moore, still a probationary employee, was told by Sedlemyer and Piatek that she was being fired, due to her job performance and absenteeism. Prior to her discharge, Moore had not received any discipline due to absenteeism, and had received one disciplinary warning relating to job performance, for failing to pull a privacy curtain. At trial, Sedlemyer testified that Moore "had to leave early a lot because she had difficulties; she called off. Her job performance we didn't feel was up to par . . . ." These assertions were not supported by corroborative evidence and, indeed, prior to the discharge, Moore had not been counseled concerning any of these matters, at any time.

The record evidence shows that once Moore, who had been warned when she was hired not to support Local 585, began openly to engage in union activities, including informational picketing, she was quickly discharged. In view of the Respondents' knowledge of her activities, their overwhelming anti-union animus and their failure to articulate lawful reasons, supported by evidence, to explain the firing, I must conclude that Moore was discharged due to her union activities, in violation of Section 8(a)(3) of the Act.

Linda Bernard worked as a part-time LPN at Haida Manor from August 1994 until December 1997. She was active in support of Local 585's efforts to organize the LPNs working at that facility, an effort, as noted, which was opposed by the Respondents on the ground that the Haida LPNs are statutory supervisors. Bernard's prounion activities included participation in a demonstration in front of the facility which was videotaped by a supervisor, Brenda Shilling, the dietary service manager.

As a part-time worker, Bernard did not have a set work schedule. Like other part-time LPNs, her scheduled days could be supplemented as, under facility policy, part-time LPNs were called, in order of seniority where possible, to replace scheduled LPNs who "called off." In January 1996, Bernard and part-time LPN Gloria Rainey sent a note to DON Sedlemyer requesting that, in the case of call-offs, they be called to fill in, in order of seniority. In response, Bernard and Rainey were advised that call-offs are replaced on a seniority basis. More than a year later, Bernard wrote another note, complaining that she had not been called according to seniority on various dates in February and March 1997, to replace call-offs. At trial, Bernard claimed that there were some 14 such dates in February, March and May 1997. However, she was unable to specify which, if any, of those times actually involved a call-off situation, as opposed to leave scheduled in advance, in which case replacements are designated in advance and placed on the original work schedule. In these circumstances, I find the evidence insufficient to show that Bernard, in fact, suffered any loss of work opportunities in call-off situations, much less that such loss occurred for discriminatory reasons. Accordingly, the corresponding complaint allegation must be dismissed.

Leatha Smith has worked as a CNA at the Respondents' Meadville facility since August 1979. For 4 years, until the fall of 1996, she was Local 585's representative to the Crawford County Labor Council, a fact known to facility officials. Smith honored the April 1996 strike, and she engaged in picketing at the facility. Before and after the strike, she wore a union pin to work. Several weeks after the work stoppage, Smith received her first discipline in 17 years of employment, a written reprimand issued on April 22 for failure to respond to a patient's call bell on April 16. The discipline was signed by DON Julie Walters who told Smith that she, Walters, was acting on the reports of two unidentified fellow CNAs. At the time Walters handed the reprimand to Smith, she did not ask Smith for an explanation. In fact, Walters had completed the reprimand form before she met with Smith. Walters testified that she acted on the reports of CNAs who had been employed at the facility for 4 months, and 1 month, respectively.

Smith was a union activist and the Respondents knew it and bore overwhelming hostility toward such activism. They disciplined Smith on the heels of the strike for an offense that they have not shown she committed. By the evidence showing that the Respondents summarily acted on the reports of new hires without even seeking to obtain the version of events as known to Smith, a very long-time employee with a spotless disciplinary record, the Respondents have not shown that they would have disciplined the employee even absent her protected conduct. I find and conclude that Smith was disciplined for discriminatory reasons, in violation of Section 8(a)(3) of the Act.

At the Meadville facility operated by the Respondents, Joyce Kircher was employed from 1972 until her discharge on April 22, 1996. A CNA there since 1985, she was, for the last 5 years of her employment preceding the firing, the Local 585 chapter president and, as such, she attended the Union's grievance meetings with the Meadville administrator. During the strike, she participated in picketing of the facility. It is undisputed that the administrator, John Ferritto, discharged Kircher on April 22 because she had "violated the Company's ethics" by remarks she made to the press. Ferritto was referring to an article which appeared in the Meadville Tribune 3 days earlier, on Friday, April 19, under the headline: "Employee: Quality Declining at Meadville Care Center." In the article, Kircher is quoted as having stated that, since the arrival of the strike replacement workers, patient care at the facility is not accomplished in a timely manner and "the overall quality has gone downhill . . . ."

The Respondents urge that Kircher's discharge was not unlawful because she engaged in disloyal conduct by disparaging the quality of services offered by the facility.[14] As I find that Kircher was fired for engaging in protected, concerted union activity, I conclude that her discharge was in violation of Section 8(a)(3) of the Act. Thus, the Board has held that em-

[14] *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting)*, 346 U.S. 464 (1953).

ployees may appeal for public support where the appeal is related to a legitimate, ongoing labor dispute between the employer and the employees, and where the employees do not engage in vilification of the employer's product or its reputation, that is, act out of a malicious motive. The fact that the employees' communication to the public raises sensitive or delicate issues, which the employer would prefer to keep out of the public eye, does not deprive the employees responsible for the communication of the protections of the Act.[15] This was the situation here where, without question, the labor dispute continued after the strike; the retention of replacement workers in positions that, theretofore, had been occupied by many of the strikers, had become a central issue; Kircher acted in that context and not out of malicious purpose.

At the Meyersdale facility, CNAs Amiee Miller and Sheila Oakes were District 1199P supporters who participated in the strike, picketed at the facility and wore union buttons and stickers to work. In addition, Miller held union office. They were, on April 18, 1996, suspended, pending investigation of allegations that they had abused a resident on April 8, as reported to facility management by relatives of another resident. Cleared of the abuse charges following the investigation, Miller and Oakes were recalled to work after 5 days, but they were not paid for the days off. I note that, thereafter, an unemployment compensation referee determined, following a hearing, that Miller had not abused a resident.

As to the April 8 incident, itself, according to Miller's credited and uncontradicted testimony, when she and Oakes took the resident in question to the bathroom to change her, they shut the door as far as they could, but could not shut it completely since the resident was in a wheelchair. Miller further testified that the resident is very resistive to care.

It is not disputed that, in suspending Miller and Oakes pending investigation, following an abuse allegation, the Respondents were acting in strict accord with state regulations and facility policy. However, the General Counsel argues that, once the individuals were cleared of the abuse allegations, they would have been paid for the days on which they were suspended and did not work, pursuant to the Respondents' work rules, absent discriminatory treatment. Thus, the work rules provide that suspended employees will receive backpay "if no disciplinary action is taken." In this connection, Meyersdale Administrator Mike Walker testified, in very general terms, that following investigation, "it was found that we probably felt it was more of a privacy and dignity matter" than a case of abuse.

Miller and Oakes were union activists and the Respondents knew it. In light of their extreme hostility towards such activities, the Respondents' failure to pay these employees, following the strike, for time lost due to suspension pending investigation of charges of misconduct found not to have occurred, pursuant to the Respondents' work rules, presents a strong prima facie case of discrimination. While the Respondents urge that they would have taken the same action under their work rules, even absent the protected conduct, they have presented no evidence to show that Miller and Oakes engaged in a lesser offense than abuse, or any offense, or that the Respondents reasonably believed that they did. Rather, Miller's description of the event in question stands, on the state of this record, uncontradicted. Accordingly, I conclude that, by their failure to pay these employees for time lost from work due to the suspensions, the Respondents violated Section 8(a)(3) of the Act.

Sandra West was employed at the Respondents' Mt. Lebanon facility as a casual or regular part-time CNA, working 7-1/2 hours per week for the 10-month period prior to the strike. West worked the night shift immediately preceding the start of the strike on April 1, 1996, at 6 a.m. Her shift was scheduled to end at 7 a.m. At the start of the shift, the charge nurse, Connie Petro, who usually, or often, functioned as the shift supervisor, asked West and other CNAs if they intended to honor the strike and they, including West, expressed their intention to do so. Petro asked that they have their work finished by the 6 a.m. scheduled start of the work stoppage, and West and the others agreed. West, in fact, completed her work by the starting time for the strike and she and the others left and joined the picket line. Immediately following the strike, West received a termination letter from facility management for "patient abandonment," walking off the job 1 hour before the scheduled end of her shift on April 1, without her supervisor's approval. At trial, Susan Karl, a weekend shift supervisor, testified that on the morning of April 1, she, and not Petro, supervised West's shift, although Petro was working as the charge nurse on the shift and often supervised the shift. According to Karl, no one informed her that West would be leaving before the end of the shift. Other CNAs on that shift, who walked off the job to join the strike at 6 a.m. on April 1, were not disciplined, and the Respondents had been advised of their intentions by letter from District 1199P.

I need not determine whether Petro or Karl was in charge of the shift on the morning of April 1. For, in notifying Petro of her intent to strike, West satisfied her obligations as Petro was the charge nurse, and, frequently, the shift supervisor, and thus, the Respondents had placed her in a position of apparent authority to receive West's notification. By discharging West because she joined the strike, the Respondents violated Section 8(a)(3) of the Act.

Also at Mt. Lebanon, CNA Susan Chojnicki, who, prior to the strike, completed her probationary period, worked as a causal or regular part-time employee. She was scheduled to report during the work stoppage on April 2 and 3, but had informed Mt. Lebanon officials that she would honor the strike, which she did. Immediately after the strike, Chojnicki received a letter from the Respondents discharging her because she was a "no call/no show" on April 2, when she was picketing at the facility. The Respondents contend that they were privileged to fire Chojnicki because she was a casual employee, an argument of no moment under Board law. I find that Chojnicki was discharged for honoring the strike, in violation of Section 8(a)(3) of the Act.

Patricia Albano worked as a CNA at the Respondents' Mt. Lebanon facility for more than 10 years, until her discharge on April 9, 1996. She served as secretary-treasurer, then vice president and, finally, president of the District 1199P chapter at

[15] See *Community Hospital of Roanoke Valley*, 220 NLRB 217 (1975), enfd. 538 F.2d 607 (4th Cir. 1976); *Allied Aviation Service Co. of N.J.*, 248 NLRB 229 (1980).

that locale, and, among her many union activities, she participated in the strike. She returned to work on April 6 and, on that day, and on April 7, she received oral and written disciplines, and she was discharged on April 9. Thus, it is undisputed, on April 6, in the morning, only, Albano and two other CNAs refused to provide nourishments (food ordered by a physician as a medically necessary dietary supplement for a particular patient) to facility residents, a traditional part of a CNA's job. Despite the historical practice to the contrary, Albano asserted to Elaine Voss, then the weekend RN supervisor, that she, Albano, did not feel comfortable passing the food as it was provided pursuant to doctors' orders. Albano received an oral warning and the other CNAs involved were also disciplined.

On April 9, the Respondents issued three separate disciplines to Albano for actions she allegedly took on April 7. She received a written warning for dressing a resident in Christmas socks on Easter Sunday, a discipline later rescinded after she, Albano, filed a grievance.[16] She was given a written warning for failure to pass thickened water[17] to a resident, as was another CNA. In this connection, Albano insisted, in her testimony, that she delivered whatever pitchers of such liquids had been prepared for her patients by the dietary department. Finally, on April 9, Albano received a suspension, pending discharge, for deliberately pouring cranberry juice and milk from a patient's tray onto the carpeted floor in the residents' lounge. At trial, Albano testified that it was the resident herself who accidentally knocked over the liquids, while CNA Sandra Dipippa, who was feeding the resident, testified that she does not know how the liquids spilled, but that she believes Albano was not in position to have spilled them.

DON Wheeler testified that the resident in question was not physically capable of lifting up the glasses of liquid, or knocking them over. She further testified that, following the incident, and after observing cranberry juice and milk on the carpeting, she asked the CNAs present in the lounge to tell her what had happened, and only CNA Denise Parsons responded. Parsons, who had participated in the strike, told Wheeler that she had observed Albano pick up the glasses, dump them on the floor and tell the resident, "so there." Parsons provided a written statement to that effect. Parsons, now Denise Bortezmana, similarly testified at trial that, on the day in question, Albano picked up the liquids, dumped them and told the resident, who was not able to knock over liquids herself, "so there." I credit her testimony.

Administrator Molinaro discharged Albano on April 9, after meeting with her and receiving her denial of wrongdoing concerning all of the above incidents. Under the Respondents' work rules, deliberate destruction of facility property is grounds for immediate discharge and the Respondents, in reliance upon Parson's report, terminated Albano's employment. Albano's claim for unemployment benefits was thereafter denied and, following a hearing, the Pennsylvania Unemployment Compensation Board of Review determined that she had "deliberately dumped juice and milk on the carpet in the facility dining room."

In light of Albano's extensive union activities, the Respondents' knowledge of same and their antiunion animus and demonstrated willingness to oppose their employees' prounion efforts by unlawful means, the inference is warranted that Albano was discharged for unlawful reasons. However, in this instance, the Respondents have shown that the employee would have been terminated even absent her protected conduct. Thus, after inviting reports from all witnesses to the April 7 incident in the residents' lounge, the Respondents reasonably acted upon the only report they received, the credible and disinterested account of Parsons revealing totally unacceptable worktime behavior by Albano, justifying discharge under the work rules. I, therefore, find and conclude that the Albano discharge was not violative of the Act.

Rose Girdany was hired by the Respondents in 1990, to work in the Mt. Lebanon facility. She began her employment as a CNA but, in 1992, she became a laundry assistant, due to a medical condition. In 1995 and 1996, she served as vice president of her District 1199P chapter and, in April 1996, she participated in the strike. On or after April 4, following the work stoppage, she received a letter from the Respondents advising her that she had been replaced, "but will be placed on a preferential hiring list based on seniority." Thereafter, although not returned to work, Girdany, as a union officer, remained active in grievance processing.

According to Girdany's credited and corroborated testimony, on June 10, 1996, she and Loretta Walters, a replaced laundry assistant, went to the facility for a grievance meeting. They encountered Administrator Molinaro who told Walters that she would be called back to work in order of seniority, when positions became available. Then, Molinaro told Girdany that he did not like her "attitude" or her "mouth," and that she "no longer worked there" and she had to leave the premises. Molinaro, in his testimony, denied that he discharged Girdany in this time period, but he did not address the June 10 conversation about which she testified. I find that the events of June 10, 1996 transpired as described by Girdany, and I conclude that, by informing her that she was no longer employed at Mt. Lebanon, the Respondents, by Molinaro, discharged her, in violation of Section 8(a)(3) of the Act.[18]

As found, supra, when Murray Manor facility laundry and housekeeping department employee Jeri Tagg returned from strike and picketing activities, she was told by her supervisor, Beverly Magill, that she, Tagg, would not be given full-time hours as she had made the wrong choice regarding the strike. Tagg testified at trial that, before the strike, overtime hours in the department were assigned on a seniority basis but, on several occasions in April 1996, following the work stoppage, she, Tagg, was passed over for overtime assignments in favor of less senior employees. As there is a lack of evidence showing that

[16] Albano testified that these were the only socks in the resident's drawer. DON Hope Wheeler testified that, after observing how the resident was dressed, she, Wheeler, checked the drawer and found that other socks were available.

[17] This is water with an additive to aid residents who have difficulty in swallowing.

[18] I regard as irrelevant Molinaro's additional testimony concerning efforts he made to facilitate Girdany's return to work as a CNA since, as noted, she left that position years earlier for medical reasons.

the Respondents, in April, bypassed Tagg when assigning such hours, the corresponding complaint allegation must be dismissed.

Tagg also testified that, during the 2-year period preceding the strike, she worked on Tuesdays and Wednesdays at another job and, prior to the strike, the Respondents accommodated her needs by not scheduling her for work at Murray Manor on those days unless she, Tagg, specifically advised the facility that she was available. Following the strike, she was scheduled on a number of Tuesdays and Wednesdays and she handled the problem by switching shifts with coworkers. However, after receiving her assignment to work on Wednesday, May 15, she was unable to find anyone to trade shifts with her and she so notified Magill who told her that it was her responsibility to be at work as scheduled. Tagg also reported the problem to the facility administrator, Dan Landes, who told her that, if she did not come to work on May 15, she would be regarded as a "no call-no show." On May 15, Tagg further testified, she "called off" at 7 a.m. for her 8:30 a.m. shift. Thereafter, on May 20, she received a written warning for noncompliance with the 2-hour call-off policy, as set forth in the work rules. In defense, the Respondents offered the testimony of Magill that, generally, she was able to accommodate Tagg's needs, but that she could not find a replacement for her on May 15. Landes, in his testimony, did not touch upon this matter.

The Respondents were willing uniformly to accommodate Tagg's special scheduling needs prior to the strike. Their claimed sudden inability to do so afterwards has not been satisfactorily explained. In light of Tagg's union activities, the Respondents' animus and their earlier statement to Tagg, in a discussion of work hours, that the employee had made the wrong choice about the strike, the conclusion is amply warranted that the Respondents ceased to accommodate Tagg's scheduling requirements in retaliation for her union activities. The record does not contain credible evidence suggesting any other reason for the departure from their prior practice in this regard. Accordingly, I find that the Respondents acted for discriminatory reasons, in violation of Section 8(a)(3) of the Act. Likewise, after departing from their longstanding willingness to avoid scheduling Tagg in conflict with her work hours at her other job, the Respondents unlawfully disciplined Tagg for noncompliance with the 2-hour call-in rule, although Tagg had advised the facility that she could not work as scheduled some 48 hours in advance. The Respondents, thus, further violated Section 8(a)(3) of the Act.

Tagg and Magill engaged in a heated discussion concerning work related matters on May 22, 1996, and both became very angry and they shouted at each other. When Tagg refused to obey Magill's instruction to come into her office, Magill yelled "insubordination" at Tagg. On the next day, Tagg received a written warning, signed by Magill, for unprofessional and inappropriate behavior and refusing to follow her supervisor's directives. As there is a lack of record evidence from which to conclude that the Respondents deliberately provoked this incident for unlawful ends, or otherwise acted for discriminatory reasons, and as the circumstances suggest that, even absent Tagg's protected conduct, Magill would have disciplined the employee for her actions on May 22, I find no illegality in the issuance of the discipline at issue, and I conclude that the corresponding complaint allegation should be dismissed for failure of proof.

Michelle Weaver worked as a CNA at the Respondents' William Penn facility from 1988 until July 1996. She participated in the strike, picketed each day of the work stoppage and, before and after the strike, she wore union buttons and stickers at work. In July, after the strike, during her lunch period, she openly solicited replacement employees to sign union authorization cards. On July 26, 1996, in the afternoon, Weaver was scheduled to take her break at 2:15 p.m. but she did not take it until 2:30 p.m., as fellow CNA Laurie Romig took her break late, at 2:15 p.m., and the CNAs were not permitted to leave the floor at the same time. Indeed, it was a common occurrence for CNAs to take their breaks at other than the scheduled time, due to residence care requirements. When Weaver took her break, she notified CNA Romig, but not the nursing supervisor, pursuant to the practice at the facility. Nevertheless, when Weaver returned from break, LPN Supervisor Karen Sellers informed her that she would be given an oral warning for failure to notify her supervisor before she went on break, a requirement unknown to Weaver. Later in the day, Hope Brubaker, director of staff development, told Weaver, who had accumulated four prior disciplines in the year preceding this incident, that she was being suspended for failure to notify her LPN supervisor before leaving the floor for her break. Brubaker told Weaver that she had received the new work rules. Although Weaver's suspension was never formally converted to a discharge, she was never brought back to work. Romig, who also took her break late on July 26, was not disciplined. At trial, Administrator Lee Miller testified that new work rules, requiring employees to report to the LPN charge nurse when leaving the nursing floor, were posted after the strike at the nursing stations, and may have been distributed to individual employees, assertions at odds with substantial record evidence and which I discredit.

Weaver filed a grievance over her suspension. At an August 2 grievance meeting, District 1199P representatives asserted that the discipline was ridiculous as, in a nursing home, employees are always late for breaks because they cannot stop in the middle of patient care tasks. The Respondents' labor relations manager, Ronald J. St. Cyr, answered, stating that Weaver had been "doing union business on company time."

Weaver was a union activist and the Respondents knew it. The Respondents' antiunion animus has manifested itself, inter alia, in a willingness unlawfully to discharge such employees. The Respondents, by asserting that new rules, prohibiting Weaver's conduct, were posted and distributed when, in fact, they were not, have not shown that Weaver would have been discharged even absent her protected conduct. Indeed, their official, St. Cyr, in the course of a grievance meeting, related the discharge to Weaver's activities on behalf of District 1199P. I find and conclude that the Respondents discharged Weaver in retaliation for her union activities, in violation of Section 8(a)(3) of the Act.

On September 19, 1996, a number of employees engaged in leafleting outside the William Penn facility, from 2 to 4 p.m., including CNA Glenda Smith. The leafleters stood along the road, near the driveway exit from the facility. Smith observed

ADON Kimberly Stuck driving out of the facility at about 3 p.m., and she, Smith, attempted to "flag" Stuck down to speak to her about an unrelated matter. Stuck smiled and waved at Smith, but continued on her way, and in a manner leading Smith to believe that Stuck was attempting to run her over. Smith turned to a fellow leafleter and, in a tone of voice loud enough for Stuck to hear, referred to Stuck as "that bitch." Thereafter, Smith received a 3-day suspension for making the remark.

Despite Smith's union activities and the Respondents' knowledge of same, and their overwhelming antiunion animus, establishing a prima facie case of an unlawful suspension of Smith, I am persuaded that the Respondents, in any event, would have disciplined Smith for calling ADON Stuck "a bitch," in the presence of others, an apparently unprovoked remark. As there is no showing that the Respondents otherwise tolerated such conduct toward their supervisors, I conclude that the discipline of Smith, however harsh, was not in violation of Section 8(a)(3) of the Act.

Ruth Ann Pilarski worked at the William Penn facility from 1989 until December 1996, first as a CNA and, later, as a restorative aide, a bargaining unit position. Pilarski served as union chapter president from 1992 until her employment terminated. She went on medical leave on July 15, 1996, and, in accordance with collective-bargaining contract provisions, and facility policy, she was required to renew her leave every month, on July 15, the monthly anniversary date, by appearing at the facility and signing a renewal. In August, on August 15, Pilarski turned in her renewal to ADON Stuck or her secretary, Kay. As September 15 fell on a Sunday, Pilarski sought guidance from Kay who told her to submit the renewal on the preceding Friday, or the following Monday. Kay added that renewals could be submitted up to 5 days before, and 5 days after, the monthly anniversary date. Pilarski took care of the matter on Monday, September 16. In December, December 15 of the month again fell on Sunday. Pilarski was out of town on Monday, December 16, and ill on Tuesday, December 17. On Wednesday, December 18, she called the facility and told Kay that she, Pilarski, would come in the next day, Thursday, December 19, to sign the renewal. Stuck got on the telephone and Pilarski repeated what she had said to Kay. Stuck responded, stating that "we've already sent you a registered letter in the mail stating that you've resigned because you're late signing your medical leave." Pilarski said that she had been advised that there was a 5-day grace period, but Stuck said that was not the case. The letter referred to was dated December 17.

Pilarski testified that, prior to the time of her discharge, the 30-day renewal policy had not been strictly enforced. CNA McCoy testified that, during her period of medical leave, in 1996, renewal was due on September 4. McCoy never bothered to renew and returned to work, without incident, on September 17. CNA Bransetter testified that she was on medical leave for most of 1996, and she submitted renewals to Stuck 2 days late in July, and 1 day late in October, without problem. The Respondents presented no evidence showing instances of strict enforcement of the renewal policy.

Pilarski was the Union's chapter president. The Respondents knew it and harbored an extreme degree of antiunion animus. The Respondents seek to justify the Pilarski discharge by arguing that it occurred as a result of enforcement of the clearly established renewal rule for medical leave. Yet, prior to Pilarski, the Respondents had not strictly enforced the rule. The Respondents have not explained the disparate treatment. I find and conclude that Pilarski was discharged for unlawful reasons, in violation of Section 8(a)(3) of the Act.

As previously found, on October 31, 1996, Luann Riden, a CNA at the William Penn facility, was instructed by a management official to leave the building during off-duty hours because she was a union member, in violation of Section 8(a)(1) of the Act. Riden had honored the strike and, thereafter, engaged in union leafleting. In January 1997, there were residents at the facility with communicable diseases warranting their isolation from other patients. Riden was instructed by the nurses that, if pregnant, or if she had not had the chicken pox, she was not to enter the isolation rooms. As Riden was, in fact, pregnant at the time, and as she was assigned to work on station 2, where two of the isolated residents were located, she arranged to switch sides with a CNA assigned to station 1, making it easier for Riden to avoid the isolation rooms. Despite the uncontradicted record evidence that such switches were, theretofore, routinely approved, absent overtime implications, ADON Stuck denied Riden's request to approve the switch. When, thereafter, Riden presented a doctor's note in support of her request, Stuck and DON Margaret Weaver would not accept it, and they told the employee that "there was no light duty," and that, if she did not get the note changed, she would have to take a leave of absence. Faced with this situation, Riden had her physician change her restrictions. Based on the foregoing, I find that the Respondents refused to follow established facility practices, and allow Riden to switch sides with another CNA, in retaliation for her union activities. By so refusing to accommodate Riden's needs, necessitated by her pregnancy, the Respondents violated Section 8(a)(3) of the Act.

Christine Hayes worked as a CNA at the Respondents' Lancaster facility from April 1993 until her discharge on October 31, 1995, several months before the strike. Beginning in spring 1995, she served as a Local 668 acting shop steward, and, in that capacity, she met with management officials. Hayes was also on the Union's bargaining committee, following contract expiration. On October 25, 1995, she was suspended, pending investigation for discharge, for "gross negligence in performance of job duties," which, under the Respondents' work rules, warrants immediate discharge. She was fired 6 days later.

With regard to the events of October 25, Hayes moved a resident out of bed, and into a wheelchair, to go to a hairdresser appointment. Although she knew that the resident needed a pummel curtain on the wheelchair, to help keep her in position on the chair and prevent her from falling, she, Hayes, could not find the cushion and, so, put an ordinary pad on the chair and took the resident to the charge nurse. Hayes told the charge nurse that the resident was ready for her haircut but did not have a pummel cushion because Hayes could not find one. While it is undisputed that Hayes knew that the resident required the pummel cushion, there is dispute as to whether she also knew, or should have known, that, in addition, the resident needed a restraining belt to keep her from falling out of the

chair. Although Hayes denied knowing this, she conceded in her testimony that, when she first placed the resident in the wheelchair, she also looked for such a belt but could not find it, either.

Immediately after Hayes left the resident, she fell out of the wheelchair and onto the floor. Although serious injury did not occur in this instance, there is substantial record evidence that the resident could not safely be transported without the adaptive equipment referred to, above, and that she was particularly vulnerable to a worsening of her medical condition if a fall did occur. Several hours later, when Hayes met with DON Nancy Fry and received a suspension, Hayes, according to her own testimony, told Fry that she, Hayes, did not have to express sorrow for what had happened as Fry was "nobody, you're just the DON."

Hayes was a union activist and the Respondents knew it. Given their antiunion animus, there is a prima facie case against the Respondents of unlawful discharge with regard to this CNA. However, the Respondents have shown that Hayes would have been discharged even absent her protected conduct as, by her negligent actions, she placed a resident in her care in grave danger of dire physical consequences. I conclude that the discharge of Hayes was not unlawful under the Act.

Jean Haver was employed as a CNA at the Lancaster facility from May 1985, until her discharge in September 1996. Haver was the Union's chief shop steward at Lancaster, beginning in 1990, and she wore numerous union buttons to work every day. Haver called off sick on August 13, however, that day, she was seen by Executive Director Larry Ayers walking down the street in the company of her granddaughter. Thereafter, on August 20, she was instructed to meet with Ayers, and DON Fry, at which time Haver was told of Ayers' August 13 observation. Haver explained that, on that day, she had gone to her son's house to get her medication, and that her granddaughter walked back home with her. In response, Ayers and Fry asked Haver to present a doctor's excuse for the absence, but she never did.[19]

On August 26, Fry handed to Haver a writeup suspending her, pending investigation for discharge, for "violation of attendance/sick leave policy." The writeup noted the circumstances surrounding the August 13 absence, and the failure to produce a doctor's statement, as requested. The subject memorandum also referred to three prior disciplinary actions in the preceding year. Haver was discharged on September 24.

At trial, the Respondents introduced three prior written warnings issued to Haver for violation of attendance policies, two of which were more than 1 year old on August 13, 1996, and, thus, under the Respondents' policies, were not usable to support later discipline. While Ayres testified that Haver received three warnings in the year preceding August 13, only one, a July 31, 1996 warning for excessive absenteeism, was introduced into evidence. Also introduced were the Respondents' policies permitting discipline "for claiming absence due to illness . . . under false pretenses," and allowing the facility to "require a physician's certificate for absences of less than three (3) days if the Employer has reasonable doubt as to the reason for absence."

Haver was a union activist and that was well known to the Respondents, an employer willing, again and again, to rid itself of union supporters by unlawful means. Throughout Haver's more than 11-year tenure of employment, she received many warnings concerning attendance, but the issue did not result in suspension or discharge. While, in answer to the prima facie case of unlawful discharge of this employee in 1996, the Respondents assert that she would have been fired, in any event, for lawful reasons, clear and convincing arguments why that is so have not been articulated. Alternately, the Respondents suggest that the discharge was for a fourth warning for violation of the facility's absenteeism/attendance policies, and as a result of a fourth disciplinary warning of any sort. Yet, two of the three prior warnings pertaining to attendance were stale as of August 13, and as to warnings pertaining to other matters, prior to August 13, 1996, they were briefly referred to in Ayres' testimony but never introduced in evidence or otherwise proven. Thus, the Respondents have not shown that, regardless of her union activities, Haver would have been discharged, in accordance with the progressive disciplinary policy in force at the facility, for a fourth offense. Rather, I find and conclude that the Respondents terminated her employment in violation of Section 8(a)(3) of the Act.

Also at Lancaster, Charles Williams was employed in the dietary department, as a cook, from June 1990 until his discharge in May 1996. Williams was a shop steward throughout his tenure of employment and, on behalf of Local 668, he often met with management officials. He participated in the strike and, thereafter, he was not recalled to work until May 18. On Monday, May 20, he arrived at the facility at 5:15 a.m. for his shift starting at 5:30 a.m., and he found two department employees who had not participated in the strike, dietary aides Sharon Weit and Dot Bisking, already at work. In response to Williams' questions, Weit stated that she had arrived at 4:30 a.m. for her 6 a.m. shift, and Bisking said that she came in at 4:45 a.m. for her shift starting at 5:30 a.m. It is undisputed that nothing else was said in this conversation.

Williams was particularly concerned about the foregoing matter as two department employees, strike participants, had not yet been recalled to work. He testified that, later that day, in the presence of Weit and Bisking, as well as Liz Bellman, the dietician, he told his supervisor, Dietary Manager Brian Zimmerman, that he, Zimmerman, had people "working off the clock." Williams said that it was against the law and that he would "be contacting Wage & Hour," a reference to the division of the United States Department of Labor. According to Williams, Zimmerman made no response. Zimmerman, in his testimony, stated that he could not recall a conversation in which Williams indicated that he would contact wage and hour. Williams' detailed testimony concerning the conversation contains the ring of truth and I credit it and find that he made the comments to Zimmerman as he, Williams, testified.

Later in the week, on Saturday, May 25, Williams received a telephone call, at his home, from Zimmerman, telling him not to report to work on Monday, May 27, as scheduled. Zimmer-

[19] At trial, Haver testified that she spoke to her doctor on the telephone on August 13, but did not visit his office, and had no excuse to present.

man said he could not tell Williams the reason, and he referred Williams to Executive Director Ayers. The employee was unable to reach Ayers until June 10, when they met and Ayers told Williams he had been suspended for "harassment and threats." Ayers would not tell Williams who it was that he allegedly harassed and threatened, but, according to Williams, Ayers did state that Williams had taken the matter out of his, Ayers', hands by calling wage and hour. Ayers testified that the subject of contacting wage and hour "was not raised, to my recollection, at all," and he denied making the statement about it attributed to him by Williams. Zimmerman, who was present for the conversation, likewise could not recall any discussion of wage and hour.[20] Again, I found Williams the more believable witness and I further find that the June 10 conversation transpired as he testified. By the conclusion of the meeting, Williams had still not received a disciplinary writeup. At no time was his version of events sought or received. He, thereafter, filed a grievance.

At the third-step meeting on Williams' grievance, the Respondents advised him that he had harassed and threatened Bisking, Weit, and a cook, Rick Scott, who worked Williams' shift during the strike and after and, upon Williams' return to work, was transferred to the night shift.[21] Williams was shown statements signed by Scott and Bisking, the former stating that, on May 22, Williams had told Scott that he, Williams, "[W]ould kick my ass," and the latter asserting that Bisking felt "uncomfortable" working with Williams and found his demeanor "threatening." It was on the strength of those statements, obtained by Zimmerman after Scott had reported to him the alleged May 22 remark, that Ayers decided to discharge Williams without speaking to him or in any way seeking to hear his side of the story. At trial, Williams denied having harassed or threatened any of these individuals. In fact, he testified that, following his return to work, he had neither spoken to Scott nor been alone with him. His only conversation with Weit, or Bisking, he stated, was as set forth, above.

Williams, throughout his employment at Lancaster, was a leading union activist who made the Respondents well aware of his activities and, as determined, the Respondents maintained an extreme degree of antiunion hostility. The Respondents have not shown that Williams would have been suspended indefinitely, or discharged, even absent his protected conduct. Williams was a veteran employee with a clean disciplinary record who had been rated "very good" in his evaluations. Yet, on the basis of Scott's report that William would "kick my ass," and the statement solicited from Bisking concerning Williams' general demeanor, the Respondents raced "pell mell" to judgment, and to the indefinite suspension of Williams, without even advising him of the nature of his alleged misconduct, much less affording him an opportunity to present his version of occurrences. This course of events suggests, in the strongest of ways, that the Respondents were out to rid themselves of Williams, by any means available, and seized upon the Scott statement as a pretext to mask its true motivation. I find and conclude that Williams was discharged in violation of Section 8(a)(3) of the Act.

Cheryl Danner worked as a CNA at the Respondents' Camp Hill facility from August 1995 until her discharge in April 1996, and she wore union insignia to work every day. While the Camp Hill employees did not go on strike, many of them picketed at the facility on April 2, not including Danner who was scheduled to work. When Danner arrived at the facility for work that day, the administrator, Courtney O'Connor, asked her if the picketing made her happy, and Danner replied, stating that it did. Danner then proceeded to punch in for her shift, and she went to her workstation. As the prior shift of CNAs was not ready to do "report," a summary of what "was happening to the residents," Danner, while waiting, walked into the residents' dining room, and out onto the balcony, where she stayed for 10 or 15 seconds and yelled to and waved at several friends who were engaged in picketing. She then proceeded to her station and did not miss any of the "report." According to Danner's credible, corroborated testimony, facility rules do not prohibit employees from walking out onto the balcony, whether or not accompanied by a resident, and employees do so and are not reprimanded.

Later that day, Danner, who had received four disciplines in the year preceding April 2, 1996, was given a writeup, signed by O'Connor, suspending the employee, pending investigation for discharge, for "conduct widely regarded as immoral, improper, fraudulent or otherwise inappropriate in the work place," specifically, "leaving the work area during work time" without permission and, on the balcony, "engaging and involving self in mass informational picketing while on duty and on facility property." Danner was discharged 1 week later. In explanation, Joan Eichelberger, director of staff development at Camp Hill, testified that employees were not allowed out on the balcony, on worktime or on breaks, unless they were there because they had taken a resident out. The Respondents produced no rule to that effect and Eichelberger's testimony in this regard is not credited. She further testified that Danner's discharge was supportable both under the progressive disciplinary policy and solely in response to her actions of April 2.

The asserted reason for the Danner discharge, that she had spent some seconds on the balcony while waiting for "report," in violation of a rule that the evidence shows did not exist, can only be described as bizarre. In light of the Respondents' antiunion hostility, the conclusion is amply warranted that the reason for the firing was Danner's known sympathies with the actions of the pickets. The discharge, thus, was in violation of the Act.

Susan Teetsel began working for the Respondents at the Carpenter Care facility in 1992, as a CNA. She was a work area leader for District 1199P, responsible for keeping employees in her locale informed of union matters. Teetsel wore union badges and tags to work. On January 30, 1996, long prior to the strike, she was suspended pending investigation of allegations that she physically and/or mentally abused a patient in her

[20] Williams had not, in fact, made contact with the Government office.

[21] Despite their separate shifts, the work hours of Williams and Scott overlapped for some 1-1/2 hours per day.

care.[22] After 3 days, and following the facility's investigation, Teetsel was cleared of the abuse charge and reinstated, but was written up for misconduct in the matter, and she was not paid for the time off. Contrary to the General Counsel, I find no discriminatory treatment in that regard.

According to Teetsel's testimony, on January 28, she was caring for a resident whom she described as "confused and very weepy, and didn't know what she wanted to do." Teetsel told the resident that she needed to get help to move her, the resident, from her bed and into a wheelchair, the patient's normal morning routine, and that it might take a few minutes. The resident was crying when her husband walked into the room, and the husband said to Teetsel that he could not understand why it was taking so long to get help. Teetsel replied, stating that "this is what our union is trying to solve, is the fact that we don't have enough help, and we need more." The husband, Teetsel testified, answered that "I really don't care what the blankety blank union wants to do, I want my wife out of bed." This shouted conversation was overheard by the charge nurse, Mary Ann Saranchak, who found another CNA to assist Teetsel in getting the patient up. Saranchak then instructed Teetsel to leave the resident's room. The January 30 suspension ensued.

Jean Franko, the Carpenter Care DON, testified that, later on January 28, following the incident in question, the patient's husband visited the DON's office, stated that he did not want Teetsel to take care of his wife again and threatened to remove his wife from the facility. The husband also said that he was sick and tired of hearing from Teetsel about what was going on with the Union. Franko interviewed the resident, in the course of her subsequent investigation, and found her to be quite competent. She also spoke to, and received written statements from, Saranchak, social worker George Pittman and CNA Allison Reeves. On the basis of the investigation, the DON concluded that Teetsel, on the day before January 28, had failed to bathe this resident, or change her nightgown, or report this to the RN supervisor. On January 28, Franko testified, the patient became upset when Teetsel insisted that she be moved into a wheelchair, rather than her lounge chair, in violation of the resident's rights. As a result, Franko and then-Executive Director Jeff Rentner concluded that, while Teetsel had not engaged in patient abuse, she was guilty of misconduct justifying a write-up and the refusal to pay her for the 3 days of her suspension.

Franko's conclusions appear reasonably based and stand, on the state of this record, essentially uncontradicted. Despite the General Counsel's prima facie case of discriminatory refusal to pay Teetsel for the time off at issue, I am persuaded by the DON's testimony that the Respondents would have taken this action even absent Teetsel's protected conduct. Accordingly, the complaint allegation in this regard must be dismissed.

At the York Terrace facility, as elsewhere, the Respondents, under the terms of the contract covering the service and maintenance employees, which expired on November 30, 1995, had the right to mandate that CNAs work overtime, per procedures set forth in the contract. On May 12, 1996, Mother's Day, an employee called in sick, leaving the facility, under state regulations, one CNA short. The DON, Carolyn Nelson, then sought volunteers from those present at the home, but was unsuccessful in that endeavor. She then decided to mandate overtime of a CNA from among those on duty, in inverse order of seniority. Successively, CNAs Antoinette Bainbridge, Ann Marie Daubert, Tina Brown, Shannon Flickinger, and Samantha Yohe were ordered to stay at work, and each of them refused to do so. Nelson suspended each of those CNAs for refusing to comply with a direct order. The amended consolidated complaint alleges, and the answer admits,[23] that, in refusing to work mandatory overtime, the five CNAs involved engaged in concerted activity regarding a matter of concern among the employees.

District 1199P filed a grievance over the issuance of the suspensions and, at a third-step meeting held in June 1996, the Union argued that the facility had not met its obligation, on May 12, to seek volunteers from employees not then present at the nursing home before mandating that anyone already there stay and work an additional shift. The Union also asked why the five individuals had been suspended, rather than had written warnings issued to them, as had been done in the past.[24] The Respondents' representative, Ron St. Cyr, stated that the greater discipline had been imposed, here, because the CNAs "had acted in concert." Thereafter, by letter to the Union dated June 25, 1996, St. Cyr reiterated that the severity of the penalty was due to the fact that "this was a concerted action."

The pleadings and the record evidence thus establish that Bainbridge, Daubert, Brown, Flickinger, and Yohe acted concertedly in refusing to work overtime on May 12, 1996, and they were suspended because the Respondents understood that they had acted in concert. As employees have a protected right to engage in a concerted refusal to work mandatory overtime, so long as that refusal is not a recurring one,[25] I find and conclude that the Respondents issued the suspensions in violation of Section 8(a)(1) of the Act.

Also at York Terrace, Susan Spiess worked as a CNA from September 1994 until she was discharged in November 1996. In March 1995, she became a union delegate and, as such, she processed grievances and met with management officials on behalf of the Union. Spiess wore union buttons to work.

In May 1996, Spiess was in the break room,[26] prior to the start of her shift, discussing a pending grievance with another employee, Diane Bridges, involving the discharge of a coworker. Among the employees also in the room at that time was Lucy Myro, a union member, who stated that, in her view,

[22] As found in considering a similar action by the Respondents at another facility, suspension in this situation is mandatory due to the nature of the alleged misconduct.

[23] At midtrial, I denied the Respondents' motion to change its answer in this regard, some 1 year after its filing, in the absence of compelling reasons to permit it to do so. The Respondents' posttrial motion, seeking to accomplish the same result, is likewise denied.

[24] The record evidence shows that there were two cases of refusal to work mandated overtime at the facility in the past, and, in both instances, the offenders received a warning.

[25] *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1039 (1992); *Sawyer of Napa, Inc.*, 300 NLRB 131, 137 (1990).

[26] The breakroom is not regarded as a patient care area when the door is closed, as it apparently was in this case. However, it is located adjacent to a patient care area.

the grievant under discussion did not deserve reinstatement. According to Spiess, she told Myro that if she, Spiess, "wanted your opinion, I would ask for it," and the conversation then ended. According to the others present, who testified in this proceeding, Spiess, in a raised voice, told Myro to "mind your fucking business," and Myro began to cry. Myro testified that, following the incident, she reported the matter to the facility ADON, Nina Granito, and she, Myro, provided a written statement. Later in the day, Granito told Spiess to go home as she was being suspended for 3 days for harassing a coworker. Spiess was not given any opportunity to explain, or offer her side of the story, and she received no written notification concerning the matter. When she returned to work, following the period of unpaid days off, she was given a writeup, dated May 15, 1996, and signed by the York Terrace administrator, Arlene Postupak, imposing the suspension pending investigation for "conduct widely regarded as immoral, improper, fraudulent or otherwise inappropriate in the work place, including, but not limited to, harassment of other associate." At trial, Postupak testified that, in approving the suspension, she relied upon the May 15 written statements of Myro and the others present.

Concerning this and other matters, Spiess appeared to me to testify in a manner calculated to advance her own interests. On the other hand, Myro impressed me as a truthful and more reliable witness. Accordingly, I find that the breakroom discussion occurred essentially as described in her corroborated testimony. Nevertheless, I find that the suspension of Spiess was violative of the Act. Thus, Spiess was a union activist and this was well known to the Respondents who, repeatedly, were willing unlawfully to discipline such employees in furtherance of their antiunion approach to labor relations. The Respondents have not shown that Spiess would have been disciplined even absent her protected conduct. The brief off-the-clock incident in question, relied upon by the Respondents to support the discipline, occurred outside the presence of facility residents, and there is neither contention nor evidence that it was loud enough to disturb anyone or that facility operations were in any way disrupted. The punishment imposed, quickly and without affording Spiess an opportunity to even comment upon the matter, was so out of proportion to the alleged offense as to lead me to conclude that the Respondents seized upon this essentially trivial matter to justify an unlawfully motivated discipline. I find and conclude that the May 15, 1996 suspension of Spiess was in violation of Section 8(a)(3) of the Act.

With regard to the Spiess discharge, she was on duty for the afternoon shift on Friday, November 15, 1996, when the facility was shortstaffed. Thus, Spiess and CNA Holcomb worked the "skilled unit" by themselves, without the presence of a third CNA usually assigned to that unit, from 3 until 7 p.m., when Karen Monahan arrived. At supper break, according to the credited testimony of LPN charge nurse, Kristin Krusnoski, Spiess told Krusnoski that she had completed her section and the charge nurse replied, telling Spiess to help Holcomb and Monahan, after Spiess' break, as the others were behind in their work. Spiess became angry and she and Krusnoski exchanged profanities and yelled at each other. Spiess told Krusnoski to "stay the fuck off her back." Later in the evening, Krusnoski found Monahan crying and learned it was because Spiess had yelled at her, claiming "it was all her fault." Spiess left early that night, due to the illness of one of her children.[27]

Spiess reported her version of the events of November 15 to DON Nelson on Monday, November 18. Nelson testified that, on that day, she also received a report from the registered nurse on duty for the afternoon shift of November 15, Edna Driskill, that, in the course of the shift, Spiess had been yelling at, and pointing at, Monahan. Driskill also reported that Spiess refused to help the other CNAs and that Spiess and Krusnoski shouted at each other in the breakroom and used profanity. Nelson obtained a written statement from Driskill and corroborative statements from Monahan and Holcomb. On Tuesday, November 19, she met with Spiess, Krusnoski and Driskill and heard their stories. Spiess was suspended indefinitely that day, pending investigation, while Krusnoski received a writeup for her use of a loud voice and foul language "where residents or visitors could hear," thus, "creating and contributing to disorderly conditions," and Driskill was issued a writeup for her failure to "assert supervisory skills" to control the situation. On November 25, Spiess was discharged. The discharge notice, handed to her at that time, stated that the action was taken because Spiess threatened another employee after a verbal altercation with the charge nurse and the RN on duty.

As found above, Spiess was unlawfully disciplined in May 1996, and her discharge in November of that year presents a prima facie case of further action against her in violation of Section 8(a)(3) of the Act. However, in this instance, the Respondents have shown that the same action would have been taken even absent Spiess' protected conduct. Spiess' unprovoked conduct, in the setting of a nursing home, was sufficiently flagrant and intolerable so as adequately to explain the Respondents' action in discharging her, and the record evidence does not indicate that the Respondents merely seized upon the November 15 incident to mask other reasons for the Spiess discharge. I find no violation of the Act in this regard.

### 3. The alleged violations of Section 8(a)(5) of the Act and related 8(a)(3) issues

The April 1 to 4, 1996 strike occurred, as noted, at 15 of the Respondents' Pennsylvania facilities, namely, Monroeville, Clarion, Fayette, Franklin, Haida Manor, Meadville, Meyersdale, Mt. Lebanon, Murray Manor, Richland, William Penn, Reading, Lancaster, Caledonia, and Carpenter. In his decision in the *Beverly IV* cases, Judge Wallace determined that the strike was an unfair labor practice strike.

At the above-named facilities, the expired collective-bargaining agreements provide to unit employees the option of receiving health insurance benefits if they meet certain specified conditions. The costs of such benefits are borne partly by the employee, through payroll deduction, and partly by the employer, in an amount in addition to the payroll deduction. The agreements generally provide, as do the Respondents' policy manuals, that employees on voluntary leave of absence must pay the Company's portion of the premiums, as well as the employee portion, in order to keep the insurance in force

[27] To the extent Spiess' testimony concerning occurrences that evening differs, it is not credited since, for the reasons noted, I did not find her a credible witness.

during the term of the leave. Thus, the employee handbook states:

> If at any time during your employment you take an unpaid leave of absence, you may continue your medical and dental coverage, but you will be responsible for the full premium amount during the leave.

As a matter of practice, employees who voluntarily take time off, without pay, such as a leave of absence for personal or medical reasons, are required to pay 100 percent of the cost of their health insurance. On the other hand, employees away from work on compensable time, such as a personal day or a sick day, are not required to pay the employer's share of the premium. Also, those on short-term suspension, even if the suspension is determined to be appropriate, are not held responsible for both premium shares since the time off in that instance is not voluntary.

Following the strike, each facility, by direction of Wayne Chapman, Beverly Health and Rehabilitation Services, Inc. vice president of operations for central and eastern Pennsylvania, deducted from the pay of the employees who participated in the strike, and returned to work, the amount of the Employer's health insurance contribution covering days that those employees were scheduled to work but did not work because of the strike. The Respondents acted without notice to, or bargaining with, the Unions. In the General Counsel's view, this concededly unusual deduction was in retaliation for the employees' strike activity and was in violation of Section 8(a)(3) and (5) of the Act.

I conclude, in agreement with the Respondents, that the foregoing deduction of the Employer's share of the health insurance premiums of the strikers, covering the period of the strike, was consistent with contractual provisions and established practice under which employees, in order to retain coverage, are required to pay 100 percent of the health insurance premiums for voluntary, noncompensable periods away from the workplace. It was also consistent with the well established principle that an employer need not pay wages to strikers or otherwise finance a strike against itself. Nor were the benefits at issue here accrued benefits.[28] As the Respondents' actions were not, in their impact, inherently destructive of important employee rights, and were neither discriminatory nor a unilateral change of established terms and condition of employment, they were not violative of the Act.

The Respondents' employees are awarded as many as 3 "personal days" off work per year, depending upon their years of service, on the anniversary date of their hire, and they have until the next anniversary date to use them. Personal days are awarded to full-time employees, only, and part-time employees do not receive them. Historically, full-time employees with accrued, but unused, personal days who go on part-time status are not permitted use of those days until they return to a full-time position. At the Monroeville facility, and, perhaps, at Reading, full-time employees who participated in the April 1 to 4, 1996 strike, and who returned to part-time positions, were not permitted to avail themselves of their accrued benefit in the above-referenced regard until they resumed full-time status. As enjoyment of the accrued benefit was, thus, not denied, but postponed, and as this was done for nondiscriminatory reasons and in accordance with established policy, the Respondents, per se, violated neither Section 8(a)(3) nor Section 8(a)(5) of the Act in this regard.[29]

In August 1996, the Respondents withdrew recognition of Local 585 as bargaining representative of its service and maintenance employees at the Grandview facility and, in November, they withdrew recognition of District 1199P as the exclusive representative of its LPNs working at Mt. Lebanon. The General Counsel contends that, in each case, the Respondents acted in violation of Section 8(a)(5) of the Act. I agree.

Local 585 was certified as collective-bargaining representative in a service and maintenance employee unit at Grandview on September 26, 1991. An initial collective-bargaining agreement expired on December 31, 1994, and a successor agreement was never concluded. In spring 1996, an employee presented to the facility administrator, Tamara Montell, a petition purportedly signed by a majority of unit employees, expressing the desires of the signatories to rid themselves of the Union. In June, the Respondents announced their intention to conduct a secret-ballot poll testing the desires of the unit employees in this regard, and the Union was invited to participate in the procedure but it declined to do so. Such a poll was, in fact, conducted on August 22, 1996, by Barbara Crudo, a former mayor of Oil City, Pennsylvania, where the Grandview facility is located. On the basis of the vote, the Respondents, by letter dated August 11, 1996, and received by Local 585 on September 13, withdrew recognition. Thereafter, they refused to accept and process grievances and ceased payroll deduction of COPE payments, that is, contributions to the Union's political action fund. At the time the poll was announced, and when it was conducted, there were, outstanding, serious and unremedied unfair labor practices committed at Grandview, in violation of Section 8(a)(1), (3), and (5) of the Act.[30]

District 1199P was certified as collective-bargaining representative in an LPN unit at Mt. Lebanon on November 14, 1988. The most recent contract covering that unit expired on November 30, 1995, a year prior to the withdrawal of recognition. In November 1996, the Mt. Lebanon administrator, Anthony Molinaro, received a petition purportedly signed by 9 of the 11 unit employees, expressing the desires of the signatories to end their representation by the Union. The Respondents had no involvement in generating that document. On the strength of the petition, recognition was withdrawn, despite serious, unremedied, prior violations of Section 8(a)(1), (3), and (5) of

[28] See *Texaco, Inc.*, 285 NLRB 241 (1987).

[29] The General Counsel does not contend here that, since the particular strikers in question were, like all of the strikers, found by Judge Wallace to have been unfair labor practice strikers, they immediately should have been returned to full-time positions following the strike where they would have been eligible to use their accrued personal days at once and, on that basis, denial of their opportunity to do so was a statutory violation.

[30] See Judge Wallace's decision in the *Beverly IV* cases, supra, and the decision of Judge William Kocol in *Beverly Enterprises–Pennsylvania, Inc.*, JD–156–97 (Oct. 24, 1997).

the Act, as found by Judge Wallace, directly impacting that bargaining unit.

The above-described withdrawals of recognition were unlawful as they occurred despite unremedied unfair labor practices at the affected facilities precluding the existence of an objective basis for believing that the employees in the involved units no longer wished to have representation. It is well established that "good-faith" doubt cannot be built upon the unfair labor practices of the doubter and, in these cases, the Respondents' numerous unfair labor practices made it impossible to determine whether the Unions continued to enjoy majority support in the respective bargaining units, and precluded the Respondents from conducting a poll at Grandview. The Respondents violated Section 8(a)(5) of the Act by the withdrawals of recognition, and, too, at Grandview, by ceasing to make COPE deductions and remittances and by ceasing to accept and process grievances.

With regard to the information requests,[31] they are to be judged under settled law establishing that an employer has a statutory obligation promptly to provide, on request, relevant information needed by a union for the proper performance of its duties as collective-bargaining representative of the employer's employees.[32] Where a union's request is for information pertaining to the workers in the bargaining unit it represents, which goes to the core of the employer-employee relationship, that information is presumptively relevant. Moreover, in all cases, a "liberal discovery-type standard" is used to determine whether the information requested is relevant, or potentially relevant, necessitating its production.[33] Information requested for purposes of processing grievances, or to determine whether or not to pursue a grievance, is relevant and necessary to performance of a union's statutory role as bargaining representative.[34]

Specifically, the information requests at issue here, in chronological order, include District 1199P's February 1, 1996 letter request of the Richland facility for information regarding a proposed change from cloth diapers to "Depends" undergarments for incontinent residents, a change which the Union feared would affect adversely bargaining unit positions in the laundry department. The information was not provided. On February 29, the Union, by letter, requested of the Richland facility information concerning the facility's reported change in unit positions, from one full-time activities aide to two part-time aides, without bargaining. The Union grieved the matter. The information was not provided. On March 5, 1996, Local 585, by letter, requested of the Meadville facility information concerning the discharge of dietary aide Kelly Smith, a member of the bargaining unit. The information was not provided. Also on March 5, Local 585, by letter, requested of the Meadville facility information concerning the creation of a new CNA position on the 11 p.m. to 7 a.m. shift which, employees had reported to the Union, had not been posted. The information was not provided. On March 11, 1996, District 1199P, in writing, requested of the Richland facility the time schedules of Richland employee Margaret Pynkala, assertedly to assist in the processing of a grievance. The information was not provided. On April 4, 1996, immediately following the strike, Local 558, by letter, requested of the Caledonia facility that the Union be provided with the names of the employees whom the facility intended to replace, a list of those who would be recalled and the criteria employed in making the determination. Local 668 sought the information to help it ensure that the terms of the expired collective-bargaining agreement at Caledonia were being honored. The information was not provided.

By letters dated April 5 and 16, 1996, Local 585, and District 1199P, respectively, requested of the Franklin, Meadville, Murray, Monroeville, Clarion, Fayette, Meyersdale, Mt. Lebanon, Richland, William Penn, Reading and Carpenter facilities, information including the names, addresses, home telephone numbers, social security numbers, dates of hire, job classifications, status as full-time or part-time shifts and wage rates of all employees hired after March 15, 1996, with indication of which employees were hired as replacements during and after the strike. The Unions sought this information to enable them adequately to represent the unit employees, strikers as well as nonstrikers and replacement workers, to identify the individuals they represented and track their status and, in certain instances, to communicate with represented employees concerning contract negotiations. The Unions received no response to the requests from the Meadville and Richland facilities. The other facilities did respond, but identified the replacement workers, not by name, but by letter designation, only, stating, as justification, using language centrally provided to each facility, that it was doing so because of "incidents of harassment (under investigation)." Yet, with respect to 9 of the above-referenced 12 facilities, the record contains no evidence whatsoever of acts of harassment. While there was generalized testimony about isolated incidents of harassment at Monroeville, Murray Manor and Reading, there was no evidence offered of disciplinary action taken against anyone. In the circumstances, I conclude that the centrally directed claim, that incidents of harassment justified withholding the names of the replacement workers from the bargaining representatives, bore no relation to the actual facts at the subject facilities.

After learning from the Respondents' officials that, at Caledonia, a new attendance policy would be implemented on June 1, 1996, Local 668, by letter dated May 10, 1996, requested, inter alia, information concerning the new policy and the impetus for it. The information was not provided. By letter dated June 20, Local 585 requested of the Meadville facility information concerning the discharge of CNA Julie Whitman. The information was not provided. Following a reduction in the working hours of bargaining unit employees at the Meyersdale facility, District 1199P, by letter dated July 3, requested, inter alia, information bearing upon such a reduction, including the patient census, the names of affected employees and an explanation of why their hours had been cut. The information was not provided. Rather, in his letter to the Union of July 10, the

[31] In assessing these issues, I have accorded no weight to the testimony of Maria Fisher, formerly Maria Spinazzola, the Caledonia facility administrator, whose testimony I found vague, illogical and, often, internally inconsistent.

[32] *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967).

[33] *Ohio Power Co.*, 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).

[34] *Leland Stanford, Jr. University*, 262 NLRB 136 (1982), enfd. 415 F.2d 473 (9th Cir. 1983).

Meyersdale administrator, Mike Walker, stated that, since no layoff occurred, District 1199P's request was "not valid." By letter dated September 24, 1996, handdelivered to the Caledonia facility administrator, Local 668 requested information about facility policies needed to process a pending grievance concerning the facility's denial of light duty work, as sought by the grievant. Contrary to the testimony of administrator Fisher (see fn. 31), I find, based on the credible testimony, that the information was not provided.

In late September 1996, the Unions sent letters to the appropriate facilities, namely, Clarion, Franklin, Haida Manor, Meadville, Murray, Richland, William Penn, Lancaster, Caledonia, Camp Hill, and Blue Ridge, requesting, inter alia, "in order to represent our members and investigate grievances," a list of bargaining unit employees at each facility, full time and part time, arranged by classification and seniority, and including dates of hire, wage rates, and average number of hours worked per week during 1996. Although the record evidence shows that such information had been routinely requested and supplied in the past, at company expense, such was not the case this time. Instead, each of the administrators at the above listed facilities who responded, at all, to the information requests, sought payment to cover the claimed cost of production of the information. When the Unions renewed their requests, but declined to pay, they received letters from the Respondents' manager of labor relations, Ron St. Cyr, dated October 22, 1996, refusing to supply the requested information absent union agreement to cover the costs of preparation. The Unions did not accept this condition and the information was not supplied.

On November 22, 1996, Local 668, by letter, sought information from the Caledonia facility regarding the discharge of unit employee Denise Foltz, to assist in the Union's investigation of her grievance. Contrary to the testimony of administrator Fisher (see fn. 31), the credible evidence shows that the information was not supplied. On December 11, by letter, Local 668 requested of the Caledonia facility information regarding a then recent reduction in the work hours of full-time CNAs. When the facility did not respond, the Union renewed the request by letter dated January 16, 1997. Finally, on February 10, 1997, the facility sent to the Union a partial answer, omitting requested information concerning recent hires and providing, only, an incomplete list of employees whose hours had been reduced.

By letter dated January 17, 1997, Local 685 requested of the Meadville facility information concerning the grievances of CNAs Nancy Huttelmeyer, Pam Whitman, and Dan Bump with regard to the reduction in work hours claimed to have been suffered by them, to assist in processing those grievances. The information was not provided. On February 3, 1997, Local 585 requested of the Haida Manor facility information regarding a claimed reduction in working days and hours of the unit employees, without regard to seniority, contrary to the terms of the then-expired collective-bargaining agreement. The information was not provided. By letter dated February 4, 1997, Local 668 requested of the Caledonia facility information concerning a claimed expansion of duties of the employees in the dietary and laundry departments in order, inter alia, to process a grievance. Subsequently, a Local 668 representative made additional oral requests for this information. It was not supplied. By letter of February 28, Local 668 requested of the Caledonia facility information concerning a claimed expansion of duties of the cooks in order, inter alia, to process a grievance. Despite this, and followup oral requests for the information, it was not provided.

Under the cases authorities cited above, I find and conclude that, in each of the foregoing instances, by failing and refusing to provide the Unions with information which was relevant and necessary to proper performance of their duties as collective-bargaining representatives, and, in certain instances, failing adequately to respond to proper requests for relevant information, without justification, the Respondents violated Section 8(a)(5) of the Act. The Respondents further violated that portion of the Act by demanding payment for relevant and necessary information which, previously, had been provided routinely and without change.

The General Counsel also alleges that, following contract expiration at the various facilities, the Respondents made unilateral changes in the terms and conditions of employment of the unit employees. The Board and the courts have held, with few exceptions, that terms and conditions of employment embodied in a collective-bargaining agreement, including a grievance resolution system, remain in effect following the expiration of the contract. Such terms and conditions may not be modified without bargaining and the parties either reaching agreement or coming to impasse.[35] Moreover, and contrary to the Respondents' argument that many of the alleged unlawful changes at issue here were privileged, due to the management-rights clauses of the expired contracts, such clauses do not survive contract expiration. Rather, the "waiver of bargaining rights contained in a contractual management-rights provision normally is limited to the time during which the contract that contains it is in effect" and, absent evidence of the parties' "specific intent that the management-rights clause should survive the contract, it expires with the contract."[36] However, a violation of the bargaining obligation is not shown unless the unilateral change alters established conditions of employment and is a "material, substantial and a significant change" from prior practice.[37]

Applying these principles to the matters at issue here, I find that, in April or May 1996, at Monroeville, the Respondents violated Section 8(a)(5) of the Act when, unilaterally, they began to enforce a previously dormant policy requiring employees to provide the facility with a doctor's excuse if they "called off" from work on a weekend. On the other hand, by unilaterally implementing, at Monroeville, in July 1996, a "slo-

[35] *NLRB v. Katz*, 369 U.S. 736 (1962); *Luden's, Inc. v. Bakery Workers Local 6,* 28 F.3d 347 (3d Cir. 1994); *Champion Parts Rebuilders v. NLRB*, 717 F.2d 845 (3d Cir. 1983); *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874 (3d. Cir. 1968); *Shipbuilder Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

[36] *Buck Creek Coal, Inc.*, 310 NLRB 1240 (1993); *Furniture Renters of America, Inc.*, 311 NLRB 749 (1993), enfd. in relavant part 36 F.3d 1240 (3d Cir. 1994).

[37] *Stone Container Corp.*, 313 NLRB 336 (1993); *United Technologies Corp.*, 278 NLRB 306 (1986); *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976).

gan of the week" program, which ran for a period of 4 weeks, under which six employees every week were given the opportunity to win $2 each if they could identify the week's designated safety slogan, the Respondents did not violate the Act. Implementation of this short-lived minor program neither created a new condition of employment nor amounted to a significant change from prior practice. At the Fayette facility, in June 1996, the Respondents violated Section 8(a)(5) of the Act when, unilaterally, they, for the first time, enforced a policy under which employees received 3-day suspensions for a first refusal to work mandatory overtime, and were discharged for a second refusal. At the Franklin facility, in May 1996, the Respondents began to discipline employees for medication errors whereas, theretofore, only employees with a history of such mistakes were disciplined; began requiring employees, contrary to past practice, to make up a weekend on which they they "called off" by working the following weekend; posted a new policy restricting employee use of weekend days as part of their vacations whereas, prior to this, employees were not so restricted as long as there was sufficient staff to tend the facility. Each of these changes in terms and conditions of employment was made without notification to, or bargaining with, Local 585, in violation of Section 8(a)(5) of the Act.

At the Haida facility, in 1994 and 1995, an "associate of the month" was named each month from among unit and nonunit employees as well as management personnel and, at the end of the year, one of the monthly winners was designated "associate of the year" and given a reward of $100. The Respondents unilaterally eliminated the "associate of the year" program in 1996. I find no violation of the Act in that regard as the program was relatively short lived, affected only one person, not necessarily a unit employee, each year and had a negligible effect on terms and conditions of employment.

At Meadville, in January 1997, the Respondents made changes to the CNAs' work schedule after it was posted, contrary to the established practice of not altering schedules once they were posted except to provide coverage in case of a "call off." This occurred on a one-time basis, incidental to adjustments in the staffing level, and did not, in my judgment, amount to an unlawful unilateral change in a term and condition of employment. On the other hand when, in February 1997, the Respondents, at Murray Manor, contrary to established practice, unilaterally ceased to allow employees to "give away" work days, that is, take a day off without using up leave time by having another employee work in their stead, it altered, without bargaining, a term and condition of the CNAs' employment in violation of Section 8(a)(5) of the Act.[38] Also, at the Richland facility, the Respondents violated Section 8(a)(5) of the Act when, unilaterally, they ceased their practice of providing to District 1199P seniority lists and work schedules. The Respondents stopped sending seniority lists in December 1995, and no longer provided work schedules as of April 1996.

At the William Penn facility, following expiration of the service and maintenance employee contract on November 30, 1995, the Respondents continued to process grievances but terminated the established practice of holding meetings between District 1199P representatives and the facility administrator at the second step of the procedure. In April 1996, the facility canceled, unilaterally, its practice of allowing employees to dress casually for work on Fridays. I find that the Respondents acted in violation of Section 8(a)(5) of the Act in these regards. In May 1996, the Respondents, at William Penn, failed to post for bidding a maintenance aide position before hiring an individual to fill it from outside the bargaining unit. In December, as earlier found, the facility strictly enforced against employee Ruth Ann Pilarski its medical leave renewal policy, for discriminatory reasons. In the former instance, the evidence shows, the Respondents acted pursuant to an arguably correct belief that the maintenance aide job was not a unit position while, in the latter instance, the record evidence does not establish that strict enforcement of the renewal policy was intended as a new rule, with application beyond Pilarski's case. The Respondents did not violate Section 8(a)(5) of the Act in these instances. I also find no violation of the Act regarding the Respondents' unilateral implementation at William Penn, in March 1996, of a "safety bingo" program under which employees who chose to participate could compete for an unspecified prize during accident-free weeks at the facility. Under the program, two numbers were drawn each week in which no accident occurred and, to win, an employee needed to achieve "bingo" before the occurrence of an accident, or the game was reset. In my view, initiation of this program, which would directly affect few employees and which offered the possibility, only, to win an apparently insubstantial prize, did not materially affect the terms and conditions of employment of the unit employees but merely added minimal incentive for them to observe safety precautions.[39] Introduction of this program, without bargaining, was not in contravention of statutory obligations.

In the fall of 1995, the Respondents reduced, unilaterally, the working hours of the laundry and housekeeping department employees, for a period of about 2 weeks, at the Lancaster facility. The action was taken due to a decline in the number of residents at the home, and to avoid layoffs.[40] By so acting, without notice to, or consultation with, Local 668, the Respondents violated Section 8(a)(5) of the Act. In December 1995, without notifying or bargaining with the Union, the Respondents changed from a punchcard system for employee timekeeping to a system under which employees were required to "swipe" their name badges through a machine which registered their work arrival and departure times. Employees who neglected to bring their badges with them were sent home to get them. I find that the Respondents did not contravene their

[38] The pleadings and the credited testimony of Local 585 Representative Florence Stirbis establish that the Respondents acted without notifying or bargaining with the Union, despite the contrary suggestion contained in the testimony of the facility administrator, Daniel Landes.

[39] See *United Technologies Corp.*, supra.

[40] During the term of the collective-bargaining agreement in effect at Lancaster, until the end of 1994, the Respondents similarly reduced employee hours, for temporary periods, due to a decline in the number of residents. In those instances, the Respondents acted upon authority granted to it by the contract's management-rights provisions.

statutory bargaining obligations by this unilateral initiation of a more modern method of obtaining employees' time, in and out, as the underlying rule, requiring employees to record their time, was unchanged. This was not a "material, substantial and significant change" from prior practice.[41]

Also at Lancaster, the credible record evidence establishes that, for 5 or 6 years, until January 1996, the facility awarded $25 to the individual designated by management officials as the "employee of the month."[42] Without notice to Local 668, the program was discontinued by the Respondents, unilaterally. While in effect, both unit and nonunit employees were eligible for the award. By its nature, the program, while existent, affected only one employee each month, and not necessarily a bargaining unit employee. The winning employee was chosen based, entirely, upon subjective considerations. In my view, payment to the winning person each month was more of a gift than a term and condition of employment and the unilateral discontinuance of the program was, thus, not violative of the Act.

The credited testimony of employee Charles Williams shows that, at Lancaster, unit employees were scheduled so as to allow them regular days off, and each schedule covered a 2-week period. In January 1996, the Respondents began to prepare and post monthly schedules which afforded employees rotating rather than standard days off.[43] The new procedure lasted for about 2 months. As the Respondents did not give notice to the Union, or afford it an opportunity to bargain, before implementing the scheduling change, they acted in violation of Section 8(a)(5) of the Act. Likewise, the Respondents violated that Section of the Act when, in January 1996, they filled unit positions in the dietary department by hiring from outside the Lancaster facility a cook and an aide without first posting the positions, as required by the terms of the expired collective-bargaining agreement.

At the Caledonia facility, the Respondents, in April 1996, unilaterally ceased to follow the established practice of maintaining a list of employees wishing to work overtime, and of seeking to cover work hours left open due to "call offs" from among the employees on that list, and from other volunteers, before "mandating" employees to work overtime. Instead, the Respondents instituted, without notice to, or bargaining with, Local 668, a system under which employees were "mandated" to work overtime on a rotating basis. Likewise, it is undisputed that, at about the same time, the facility, at least for a temporary period, unilaterally discontinued its established policy of granting the day off on holidays to the first employees who requested it. Instead, the holidays for the year were divided into two groups and employees signed up for, or were assigned to, one of the groups for purposes of days off. On June 1, 1996, the Respondents, at Caledonia, unilaterally instituted an attendance policy. Previously, there had not been a policy concerning attendance. In all of the foregoing respects, the Respondents, at Caledonia, contravened their bargaining obligations, in violation of Section 8(a)(5) of the Act.

## IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents set forth in section III, above, occurring in connection with their operations as described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to leave to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. THE REMEDY

Having found that the Respondents have engaged in unfair labor practice conduct in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Due to the Respondents' wide-ranging and persistent misconduct, demonstrating a general disregard for their employees' statutory rights, a broad order, prohibiting them from "in any other manner" infringing on such rights, is warranted.[44] For the reasons fully set forth by Judge Wallace in his Supplemental Decision in the *Beverly IV* cases,[45] I conclude that the Respondents constitute a single employer within the meaning of the Act and that a nationwide order directed against Beverly nursing home operations is appropriate. Further extraordinary remedies will not be granted.

## CONCLUSIONS OF LAW

1. Beverly Health and Rehabilitation Services, Inc., its operating regional offices, wholly-owned subsidiaries and individual facilities and each of them, including its wholly-owned subsidiary Beverly Enterprises–Pennsylvania, Inc., and its individual facilities and each of them, constitute an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. District 1199P, Service Employees International Union, AFL–CIO,CLC, Service Employees International Union, Local 585, AFL–CIO, CLC and Pennsylvania Social Services Union Local 668 a/w Service Employees International Union, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By threatening applicants that they would not be hired unless they agreed in advance that, in the event of a strike, they would cross the picket line; threatening employees with job loss if they went on strike; threatening employees who participated in the April 1 to 4, 1996 strike with a reduction in work hours; informing employees that they would not be given full-time hours because of their strike participation and that certain rules of conduct applied only to them; informing employees that union members were no longer permitted inside the facility during their off-duty hours; denying normal facility access to off-duty employees who were union members; engaging in unlawful surveillance of employees' protected activities and directing employees to remove the prounion insignia they were

[41] See *Rust Craft Broadcasting of New York, Inc.*, supra. Cf. Judge Wallace's decision in the *Beverly IV* cases, supra.

[42] The testimony of Ayers, the facility administrator, that the program was in effect for a much shorter period, is not credited.

[43] Zimmerman's contrary testimony is not credited.

[44] *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[45] JD–158–99 (Nov.30, 1999).

wearing, the Respondents have engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

4. By discharging John Wilson, Tammy Rummel, Cathy Bobby, Margaret Moore, Joyce Kircher, Sandra West, Susan Chojnicki, Rose Girdany, Michelle Weaver, Ruth Ann Pilarski, Jean Haver, Charles Williams, and Cheryl Danner; permanently replacing Mary Myers; disciplining Josie Belice, Janet Crissman, Leatha Smith, Jeri Tagg, Susan Spiess, Antoinette Bainbridge, Ann Marie Daubert, Tina Brown, Shannon Flickinger, and Samantha Yohe; reducing the work hours of Rickie Piper; ceasing to accommodate the scheduling needs of Jeri Tagg; refusing to accommodate the work place needs of Luann Riden and failing to pay, for time lost due to investigatory suspension, Amiee Miller and Sheila Oakes, the Respondents have engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) of the Act.

5. By conducting a poll and, then, withdrawing recognition of Local 585 as bargaining representative of its service and maintenance employees at the Grandview facility; ceasing to make COPE deductions and remittances and to accept and process grievances at that facility; withdrawing recognition of District 1199P as bargaining representative of the LPNs at the Mt. Lebanon facility; failing to comply with the Unions' requests for information relevant and necessary to proper performance of their duties as the collective-bargaining representatives and, in certain instances, failing adequately to respond to proper requests for relevant information and by making unilateral changes in the terms and conditions of employment of the unit employees, denying notice and an opportunity to bargain to their statutory representatives, the Respondents have engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondents have not otherwise violated the Act, as alleged in the consolidated complaints.

[Recommended Order omitted from publication.]