JD(SF)–35-03
Sacramento, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

COVENANT CARE, INC., d/b/a
EMERALD GARDENS NURSING CENTER

and

Cases 32-CA-19834-1
32-CA-19880-1
32-CA-20245-1
32-RC-5032

HEALTHCARE WORKERS UNION
LOCAL 250, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

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DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at Sacramento, California on March 11 -13, 2003. On July 23, 2002, Healthcare Workers Union Local 250, Service Employees International Union, AFL-CIO (the Union) filed the charge in Case 32-CA-19834-1 alleging that Covenant Care, Inc., d/b/a Emerald Gardens Nursing Center (Respondent or the Employer) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). The Union filed the charge in Case 32-CA-19880-1 on August 6, 2002. On October 24, 2002 the Regional Director for Region 32 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act. On December 17, 2002, the Union filed the charge in Case 32-CA-20245-1. That charge was amended on January 24, 2003. On March 11, 2003, the Regional Director issued an amended consolidated complaint against Respondent in all three cases. Respondent filed timely answers to the complaints, denying all wrongdoing.

On June 27, 2002, the Union filed a petition in Case 32-RC-5032 seeking to represent Respondent's full-time and regular part-time employees at its Sacramento, California convalescent care facility. An election was held on August 9, 2002. The results of the election

were 37 votes cast for representation by the Union and 41 votes against representation. There were also three challenged ballots, which were not sufficient to affect the results of the election. Thereafter, the Union filed timely objections to the election. On December 13, 2002, the Regional Director issued a report on objections, order consolidating cases and notice of hearing. The hearing on the objections was consolidated with the unfair labor practices hearing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following: [1]

Findings of Fact and Conclusions

I. Jurisdiction

Respondent is a California corporation with offices and a principal place of business located in Sacramento, California, where it is engaged in the operation of a convalescent care facility. During the twelve months prior to the issuance of the complaint, Respondent received gross revenues in excess of $100,000. During that same period, Respondent purchased and received products valued in excess of $5,000 directly from suppliers located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

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

II. The Alleged Unfair Labor Practices

A. Background and Issues

The Union began its organizing campaign among Respondent's healthcare workers in June 2002.[2] On June 27, a group from approximately 20 employees attempted to present a petition seeking Union representation to Richard Thorpe, Respondent's executive director. Thorpe directed the employees to leave his office. The employees left the petition on a handrail

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[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

[2] At the time of the election, Respondent employed approximately 87 bargaining unit employees. The stipulated appropriate collective-bargaining unit was:

> All full-time and regular part-time employees, including all CNAs (Certified Nursing Assistants), housekeeping, laundry and dietary employees, activities assistants, receptionists and janitors employed by the Employer at its facility located at 6821 - 24th Street, Sacramento, California; excluding all managerial and administrative employees, Registered Nurses (RNs), Licensed Vocational Nurses (LVNs), central supply clerks, office assistants, office clerical employees, maintenance employees, guards, and supervisors as defined in the Act.

outside Thorpe's office and left the building. The employees congregated at the entrance to the facility. Thorpe threatened to call the police and the employees left and met across the street. Thorpe testified that he threatened to call the police because the employees were impeding access to the facility for an ambulance. The Union filed its representation petition with the Board that same date.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by:(1) implementing an invalid no solicitation\no distribution policy in response to its employees union activities, and thereafter discriminatorily enforcing that policy; (2) unlawfully restricting the areas of its facility where employees could engage in Union activity; (3) threatening to more strictly enforce its attendance policy in response to its employees' union activities; (4) telling employees that Respondent could not give them their regular annual raises until after the representation election; (5) threatening an employee with job loss in order to discourage Union activities; and (6) ordering an employee not to discuss her discipline with other employees. Further, the complaint alleges that Respondent violated Section 8(a)(3) and (1) of the act by issuing discipline to employee Frankie Cook because of her union activities. In both the unfair labor practice case and the representation case, Respondent contended that it did not violate the Act as alleged.

1. The Representation Election Campaign

After the filing of the representation petition, Respondent began discussing the Union with its employees at in-service meetings. Prior to the campaign, Respondent held in-service meetings once every two weeks to discuss patient care issues. After the petition was filed, Respondent conducted in-service meetings twice a week and included discussions about the Union in these meetings.

Prior to the Union campaign, Respondent maintained a corporate-wide no-solicitation rule, which prohibited employees from soliciting other employees during their own working time or the working time of the solicited employee. The no solicitation rule also prohibited solicitations "at all times in immediate resident care or other work areas." Respondent's corporate-wide no-distribution rule prohibited employees from distributing any written or printed materials during work time. The no-distribution rule also prohibited all distributions in immediate patient care areas or other work areas. Further, Respondent's rules denied off-duty employees "access to the interior of the location, local office, or outside areas during their off-duty hours, except as approved by the location director." These rules had not been posted at the facility prior to the filing of the representation petition.

Prior to the petition, employees and supervisors bought and sold items during working time and in working areas. On July 11, Frankie Cook, a certified nursing assistant (CNA) entered the kitchen area and placed some union flyers on a counter used for delivery of employee meals. Cook, who was on break, told Tess Abenojar, dietary service supervisor, that she intended to pass out the flyers to her co-workers. Abenojar told Cook that she could not leave the flyers on the counter and could not pass out the flyers. Cook took the flyers and left the kitchen. Shortly thereafter, Cook was paged by the facility's administrator Richard Thorpe. Thorpe told Cook that she could only pass out the flyers while on break and, even then, only while outside of the building.

The next day, Thorpe posted a policy entitled "No Solicitation, No Distribution or Trespassing Policy" on the facility's front and back doors, as well as on a door near the employee time clock. Thorpe's posting was identical to that contained in Respondent's corporate-wide rules.

Prior to the election campaign, Respondent permitted its employees to talk about a wide range of non-work related topics while on working time and in working areas. However, in mid-July, Judy Fairl, Respondent's scheduling coordinator, told Antoinette Huley, CNA, not to talk about the Union in the hallways. Also in mid-July, Janet Price, Respondent's director of staff development, told Huley that she did not care what employees talked about but that employees "really couldn't talk about the Union in the building." Employee Martha Gonzalez testified that Price told employees that while they could discuss the Union on their break or while outside, they could not talk about the union inside the building.

On July 2, Price conducted an in-service meeting with employees to review Respondent's attendance policy. Martha Gonzalez testified that Price said that she did not want to but had to enforce Respondent's attendance policy. Price said that she had to begin "writing up" employees for absences. Price also said that employees would have to arrive on time. Many of Respondent's employees work two jobs and, prior to this meeting, Respondent had permitted such employees to arrive late or leave early. Antoinette Huley corroborated Gonzalez's testimony. Huley testified that Price said that she could no longer be lenient with employee attendance. During that same week, Huley had a conversation with Price in which Price said that "if the Union would step in, that she couldn't be lenient with our scheduling any more." According to Huley, Price said that the employees would have to "shape up" if the Union won the election and that people who had second jobs could not come in late anymore. While Price testified that the meeting was a regular in-service meeting about attendance, the Union was mentioned at the meeting.

Price conducts yearly evaluations for the employees under her supervision. The evaluations are done on the employee's anniversary date. The employees receive raises based on the score given them by Price. During the campaign, certain of Respondent's employees were concerned that Respondent would not grant pay increases during the campaign period. Huley testified that both Thorpe and Rob Lonto, Respondent's director of ancillary companies, human resources and training, stated that wages were "put on hold until after the election" and that if Respondent were to grant raises before the election, "it would look like a bribe." According to Huley, she asked what the Union had to do with raises earned by employees, and Lonto answered "everything was on freeze until after the election". Huley also testified to a conversation with Price after the in-service meeting. According to Huley, Price said that if the Union came in, employees could not receive their raises before an election. Price also stated that Respondent "really couldn't do anything until after the election." Price testified that she said that if the Union won the election, everything would be negotiable. Price told Huley and the two employees with her, that at another facility it had taken a year to negotiate a contract. Later that day, Huley, Cook and two other employees asked Thorpe why the employees could not receive their raises. According to Huley, Thorpe said that granting the raises "would look like bribery."

Cook testified both Price and Thorpe said, at in-service meeting, that Respondent could not grant raises because of the Union. When Cook asked why Respondent could not give raises, Thorpe replied that since the employees "got the Union involved", Respondent had to "freeze wages." According to Cook, Price said the granting of raises would look like a bribe. Cook stated that the Union had told employees that Respondent could grant the wage raises. Price answered that the employees who had received evaluations and raises had gotten them before the Union came in but that employees whose evaluation period was after the Union campaign started could not receive any raises.

Gonzalez testified that at a meeting in early August, Price said she would conduct employee evaluations but that the resultant wage increases would not be put into effect until after the election. Price said that if the Union won the election, the parties would have to negotiate a

contract. According to Gonzalez, Price said that it could take six months to a year to negotiate a contract and that once there was a contract, Respondent "would see how much money everybody would get." The employees were told that employees who received their evaluations before the election would get their raises but employees evaluated after the election, would not get their raises but would have to await the results of contract negotiations.

On or about July 29, Cook attended a meeting held by Gus Flores, a labor consultant for Respondent. According to Cook, Flores told the employees that the Union could not do anything for the employees and that the Union could not do anything unless Respondent allowed it. Flores said that since Respondent "had the last word" and the "last say," the Union did not matter at all. Flores denied these statements and testified that he merely explained to employees the give and take of the collective-bargaining process. I credit Flores' testimony over the uncorroborated testimony of Cook. Had Flores made such a statement, surely other employees would have heard it.

2. The Discipline and Suspension of Frankie Cook

Cook has worked for Respondent as a CNA since 1998. Respondent admitted that Cook is a good employee and that it has no intention of discharging her. In June 2002, Cook began participating in the Union's organizing campaign. She was one of the approximately twenty employees who presented the Union authorization petition to Thorpe in June. Further, she attempted to pass out a union flyer in July and questioned Respondent's statements about raises during the election campaign.

As stated earlier the representation election was held on August 9, 2002. The results of the election were 37 votes cast for representation by the Union and 41 votes against representation. There were also three challenged ballots, which were not sufficient to affect the results of the election. Thereafter, the Union filed timely objections to the election. The General Counsel contends that Respondent retaliated against Cook because the Union filed objections to the election and unfair labor practice charges against Respondent. On October 17, the Regional Director of Region 32 notified Respondent that complaint would issue, absent settlement and that the Region had found merit to the objections to the conduct of the election.

On October 10, 2002, Respondent had a nursing consultant survey the facility in anticipation of an official survey by the California Department of Health Services. At the beginning of Cook's shift, she was told by the charge nurse, Rena Reprado, that a "mock survey" would take place that day. Reprado participated in the mock survey with the nursing consultant. During the survey, Reprado found that one of the residents assigned to Cook was still in bed at 9:30 a.m. In addition, one resident was not positioned correctly in her bed and another resident was found unattended on a commode. Further, Reprado found that a room assigned to Cook was not clean. At 11:45 a.m., Reprado checked and found that the patient who was incorrectly positioned had still not been cleaned. Reprado gave Cook a verbal warning to clean the room but Cook failed to clean the room. Reprado wrote a disciplinary form and submitted it to Price. Cook told Reprado that she was too busy and that the residents assigned to her were very difficult. In fact, Cook had cared for a resident not under her care and had expected another CNA to care for her resident. However, there was a lack of communication and the resident went unattended for over two hours. Price did not discuss this matter with Cook until October 24.

On October 29, Price called Cook into her office to discuss an employee counseling form written by a licensed vocational nurse that day. The form asserted that Cook had been late to help serve lunch. Cook explained that she had arrived on time but that the lunch trays were not ready. Therefore, Cook left to take care of another resident. According to Cook, Price was

satisfied with the explanation and indicated that she would discard the form. Price denied saying that she would disregard the form. However, the form was not signed by Cook and did not indicate that Cook had refused to sign the form. Accordingly, I credit Cook's testimony that Price implied that she would discard the form.

Cook testified that in November she had a conversation with some fellow employees about possible wage raises. Shortly thereafter, Price approached Cook and told her that she should not be "talking union talk" in any of the rooms and should not be discussing the Union with other employees. According to Cook, Price said Respondent would try to get rid of Cook if she continued to discuss the Union. I credit Price's testimony that she made no such threat.

One of Cook's duties as a CNA is to chart the activities of daily living (ADL) of the residents of the facility. Vicky Moseby, Respondent's assistant director of staff development, is responsible for monitoring whether CNAs complete their ADL charting. Moseby regularly audits the forms to make certain that the proper ADL charting is done. It is undisputed that employees frequently fail to complete their ADL charting and that Moseby regularly distributes audit sheets to employees. The employees then make the necessary additions to the ADL charts. The issuance of audit sheets is not considered discipline. Cook admitted that she had a habit of not completing her ADL charting and that she often received verbal warnings concerning her ADL charting. However, Cook denied ever receiving any written warning about ADL charting. Cook received audit sheets from Moseby concerning her failure to complete ADL charting on November 21-24, December 3 and 4 and December 15. On January 6, 2003, Cook received counseling for her failure to complete ADL charting for four consecutive days: January 2, 3, 4 and 5, 2003.

On December 13, treatment nurse Yolanda Wunk instructed Cook to put a resident to bed immediately after breakfast and to make sure that the patient was positioned on his side, rather than lying flat on his back. The patient in question had a severely excoriated left and right buttock. After breakfast, Wunk checked and found that that the resident was laying in bed, flat on his back. Wunk again found the resident laying on his back a half an hour later. Wunk reported the situation to Cook's charge nurse. Wunk then reminded Cook of the patient's serious skin condition and the need to turn the patient on his side. Cook did not respond and continued with her duties.

At 10:20 a.m., Wunk again found the resident laying on his back. This time, Wunk wrote a report characterizing Cook's conduct as insubordination. Wunk submitted the incident report to Price.

Price read Wunk's report and was familiar with the patient involved. Based on the nature of the patient's condition and Wunk's report of insubordination, Price decided to suspend Cook. On December 16, Price spoke with Cook about Wunk's report. Cook at first claimed that she had turned the patient but later claimed that the patient could turn himself.[3] Cook also claimed that she had turned the patient after her break. Cook asserted that Respondent was singling her out and that she did not have any performance issues in the past. Thereafter, Price reviewed Cook's personnel file with the employee. . The file showed numerous incidents where Cook had failed to do her ADL charting, a warning concerning attendance in February 2002, and four minor incidents involving resident care in 2001 and 2002. Price suspended Cook for three days. According to Price, while she reviewed Cook's entire disciplinary record with Cook, she suspended Cook solely because of the insubordination incident with Wunk.

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[3] The credible testimony of Wunk and Price establishes that the patient was unable to turn himself.

Cook returned to work from her suspension on December 20. On that date, Cook, contending that she had done nothing wrong, asked her charge nurse Reprado why she had been suspended. Approximately, 20 minutes later, Price called Cook into her office. Price told Cook that Cook knew why she had been suspended and told Cook not to talk to any of her co-workers about the disciplinary action.

B. Conclusions

1. The independent Section 8(a)(1) allegations

In a health care setting, an employer's ban on employee solicitation must be limited to immediate patient care areas and a rule that prohibits employee solicitation in areas other than immediate patient care areas is considered presumptively invalid. See *St. John's Hospital & School of Nursing*, 222 NLRB 1150 (1976); *Health Care and Retirement Corp.*, 310 NLRB 1002, 1005 (1993); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1987). In the instant case Respondent's no solicitation rule prohibited all solicitations in resident care or "other work areas." There was no limitation on or explanation of the phrase "other work areas." Further, the evidence indicates that employees Cook, Huley and Gonzalez were told that they could not discuss the Union inside the building. Accordingly, I find that Respondent violated Section 8(a)(1) of the act by prohibiting solicitation in work areas other than immediate patient care areas. *St. John's Hospital & School of Nursing*, 222 NLRB 1150 (1976); *Health Care and Retirement Corp.*, 310 NLRB 1002, 1005 (1993); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1987). Prior to the advent of the employees' union campaign, Respondent did not enforce its no-solicitation/no distribution rules. Respondent's enforcement of these rules in response to its employees' union activities is a violation of Section 8(a)(1) of the Act. See, *Hudson Therapy Sales*, 264 NLRB 61, 72 (1982).

Respondent's rules denied off-duty employees "access to the interior of the location, local office, or outside areas during their off-duty hours, except as approved by the location director." Absent a business justification, an employer may not deny off-duty employees entry to parking lots, gates and other non-working areas. An employer's non-access rule for off-duty employees is valid only if it : "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." *Tri-County Medical Center*, 222 NLRB 1089, 1090 (1976). Respondent's rule barred access to both interior and exterior non-work areas of the facility. Accordingly, I find the rule is overly broad. *Hudson Therapy Sales*, id, n.2.

An employer violates Section 8(a)(1) of the Act by threatening to more harshly enforce existing rules in response to a union election. *Hyatt Regency Memphis*, 296 NLRB 259 (1989). The record establishes that Price told the employees in July that she was going to begin enforcing Respondent's attendance and tardiness policies. Price said that she did not want to but had to enforce Respondent's attendance policy. In addition, Price said that she had to begin "writing up" employees for absences. Price also said that employees would have to arrive on time. Many of Respondent's employees work two jobs and prior to this meeting, Respondent had permitted such employees to arrive late or leave early. Further, Price told Huley, during that same week, that "if the Union would step in, that she couldn't be lenient with our scheduling any more." Price said that the employees would have to "shape up" if the Union won the election and that people who had second jobs could not come in late anymore. Accordingly, I find that Respondent threatened stricter enforcement of its attendance policies in response to its employees' union activities.

Respondent had a practice of giving annual evaluations and then granting wage increases based on those evaluations. During the campaign, certain of Respondent's employees were concerned that Respondent would not grant pay increases during the campaign period. Both Thorpe and Lonto, stated that wages were "put on hold until after the election" and that if Respondent were to grant raises before the election, "it would look like a bribe." Huley asked what the Union had to do with raises earned by employees, and Lonto answered, "Everything was on freeze until after the election". After the in-service meeting, Price told Huley that if the Union came in, employees could not their raises before an election. Price also stated that Respondent "really couldn't do anything until after the election." In addition, Thorpe told employees that granting the raises "would look like bribery."

Price and Thorpe said at an in-service meeting that Respondent could not grant raises because of the Union. When Cook asked why Respondent could not give raises, Thorpe replied that since the employees "got the Union involved", Respondent had to "freeze wages" or put wages "on-hold." Price said the granting of raises would look like a bribe. Cook stated that the Union had told employees that Respondent could grant the wage raises. Price answered that the employees who had received evaluations and raises had gotten them before the Union came in but that employees whose evaluation period was after the Union campaign started could not receive any raises.

At a meeting in early August, Price said she would conduct employee evaluations but that the resultant wage increases would not be put into effect until after the election. Price said that if the Union won the election, the parties would have to negotiate a contract. Price said that it could take six months to a year to negotiate a contract and that once there was a contract, Respondent "would see how much money everybody would get." The employees were told that employees who received their evaluations before the election would get their raises but employees evaluated after the election, would not get their raises but would have to await the results of contract negotiations. The evidence shows that all employees received their evaluations and raises. The evaluation of only one employee was late.

An employer's legal duty in deciding whether to grant benefits while a representation case is pending is to determine that question precisely as it would if a union were not in the picture. *Pennsylvania Gas & Water Co.*, 314 NLRB 791, 793 (1994), enfd. 61 F.3d 895 (3d Cir. 1995). If the employer would have granted the benefits because of economic circumstances unrelated to union organization, the grant of those benefits will not violate the Act. On the other hand, if the employer's course is altered by virtue of the union's presence, then the employer has violated the Act. See also, *J. & G. Wall Baking Co.*, 272 NLRB 1008, 1012 (1984).

Moreover, while an employer may postpone the granting of wages or benefits that would otherwise have been granted to employees in a unit in which an election petition has been filed, its communications regarding that decision must advise employees that the action is being taken only to avoid interference with the election. More specifically, the employer must assure the affected employees that (1) the benefits will be granted regardless of the election results, (2) the "sole purpose" of the postponement "is to avoid the appearance of influencing the election outcome;" and (3) the "onus for the postponement" is not placed upon the union. *Atlantic Forest Products*, 282 NLRB 855, 858 (1987); *AutoZone, Inc.*, 315 NLRB 115, 122 (1994), enfd. 83 F.3d 422 (6th Cir. 1996).

I find that Respondent unlawfully told employees that annual raises were being placed on hold until after the election because such raises would look like bribes. Further, Respondent told employees that if the Union won the election, the annual raises would be subject to negotiations, which could take a year. See Earthgrains Co., 336 NLRB No. 117 (2002).

2. The Section 8(a)(3) allegations

In *Wright Line, A Division of Wright Line, Inc.,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983).

For the following reasons, I find that General Counsel has not even made a prima facie showing that Respondent disciplined its employee Frankie Cook in violation of Section 8(a)(3). General Counsel has established that Respondent had knowledge of Cook's support of the Union. Cook signed the employee petition seeking union representation and was an open and vocal union supporter. However, the evidence reveals that it was not Cook's union activities but rather legitimate business reasons which led to the written incident reports and the suspension given to Cook.

On October 10, 2002, during a mock survey, Reprado found that one of the residents assigned to Cook was still in bed at 9:30 a.m. In addition, one resident was not positioned correctly in her bed and another resident was found unattended on a commode. Further, Reprado found that a room assigned to Cook was not clean. At 11:45 a.m., Reprado checked and found that the patient that was incorrectly positioned had still not been cleaned. Reprado gave Cook a verbal warning to clean the rooms but Cook failed to clean the rooms. Reprado wrote a disciplinary form and submitted it to Price. Cook told Reprado that she was too busy and that the residents assigned to her were very difficult. In fact Cook had cared for a resident not under her care and had expected another CNA to care for her resident. However, there was a lack of communication and the resident went unattended for over two hours. There is no credible evidence that Reprado had any animus against Cook because of her union activities. Rather, the credible evidence establishes that Reprado wrote a report and gave that report to Price because she was frustrated with Cook's failure to follow her directions during the mock survey. Price routinely discussed that report with Cook. Price's delay in discussing the matter with Cook, does not establish any unlawful motive. I further note that these events took place after an election in which the Union received less than a majority of the votes cast.

Moseby, Respondent's assistant director of staff development, is responsible for monitoring whether CNAs complete their ADL charting. Moseby regularly audits the forms to make certain that the proper ADL charting is done. It is undisputed that employees frequently fail to complete their ADL charting and that Moseby regularly distributes audit sheets to employees. The employees then make the necessary additions to the ADL charts. The issuance of audit sheets is not considered discipline. Cook admitted that she had a habit of not completing her ADL charting and that she often received verbal warnings concerning her ADL charting. Cook received audit sheets from Moseby concerning her failure to complete ADL charting on November 21-24, December 3 and 4, and December 15. On January 6, 2003, Cook received counseling for her failure to complete ADL charting for four consecutive days: January 2,3,4 and 5, 2003. I find no evidence of anti-union animus on the part of Moseby. The counseling given to Cook appears reasonable in light of the fact that she had not completed her ADL charting for four consecutive days and had a prior history of not completing these State-required charts.

Finally, the evidence fails to establish that Cook was suspended for any reason other than her failure to follow the instructions of Yolanda Wunk, treatment nurse, on December 13, 2002. On December 13, Wunk instructed Cook to put a resident to bed immediately after breakfast and to make sure that the patient was positioned on his side, rather than lying flat on his back. The patient in question had a severely excoriated left and right buttock. After breakfast, Wunk checked and found that that the resident was laying in bed, flat on his back. Wunk again found the resident laying on his back 30 minutes later. Wunk reported the situation to Cook's charge nurse. Wunk then reminded Cook of the patient's serious skin condition and the need to turn the patient on his side. Cook did not take corrective action.

At 10:20 a.m., Wunk again found the resident laying on his back. This time, Wunk wrote a report characterizing Cook's conduct as insubordination. Wunk submitted the incident report to Price. I find no evidence of union animus on the part of Wunk.

Price read Wunk's report and was familiar with the patient involved. Based on the nature of the patient's condition and Wunk's report of insubordination, Price decided to suspend Cook. On December 16, Price spoke with Cook about Wunk's report. Cook at first claimed that she had turned the patient but later claimed that the patient could turn himself. Cook also claimed that she had turned the patient after her break. Cook asserted that Respondent was singling her out and that she did not have any performance issues in the past. Thereafter, Price reviewed Cook's personnel file with the employee. According to Price, while she reviewed Cook's entire disciplinary record with Cook, she suspended Cook solely because of the insubordination incident with Wunk. General Counsel has failed to show that Cook was suspended for any reason other than Cook's insubordination.

3.The Representation Proceeding

Having concluded that Respondent, between the date of the filing of the petition and the date of the election threatened employees with the loss of wage increases and harsher enforcement of work rules in violation of Section 8(a)(1) and unlawfully interfered with union solicitation and distribution, it follows that this conduct affected the results of the election and was such as to warrant setting aside the election. *American Safety Equipment Corporation*, 234 NLRB 501 (1978); *Dayton Tire & Rubber Co.*, 234 NLRB 504 (1978). Therefore, I shall recommend that the election should be set aside.

Conclusions of Law

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining rules restricting the areas in which employees on nonwork time may orally solicit for labor organizations, and restricting the nonwork areas in which employees on their nonwork time may distribute materials on behalf of labor organizations.

4. Respondent violated Section 8(a)(1) by enforcing its no-solicitation/no-distribution/no-access policy, in retaliation for employees' union support or other concerted activities."

5. Respondent violated Section 8(a)(1) of the Act by telling its employees that they would not receive planned pay increases because of the Union and by threatening employees

with discipline for attendance offenses that previously involved no disciplinary action, because of the Union.

6. Respondent did otherwise violate the Act as alleged in the complaint.

7. The unfair labor practices found above are sufficient to set aside the election in Case 32-RC-5032.

Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist there from and take certain affirmative action to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[4]

ORDER

Respondent, Covenant Care, Inc., d/b/a Emerald Gardens Nursing Center, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

   a. Promulgating and maintaining rules restricting the areas in which employees on nonwork time may orally solicit for labor organizations, and restricting the nonwork areas in which employees on their nonwork time may distribute materials on behalf of labor organizations.

   b. Telling its employees that they would not receive planned pay increases because of the Union.

   c. Threatening employees with discipline for attendance offenses that previously involved no disciplinary action because of the Union.

   d. Discriminatorily enforcing its no distribution/no solicitation rules in retaliation for its employees' union activities.

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

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

[4] All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a. Within 14 days after service by the Region, post at its Sacramento, California, facilities copies of the attached Notice marked "Appendix".[5] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since July 2, 2002.

b. 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 Respondent has taken to comply.

IT IS FURTHER ORDERED that the results of the election in Case 32-RC-5032 be set aside and that a rerun election be conducted under the supervision of the Regional Director for Region 32 of the Board.

Dated, at San Francisco, California, this 22nd day of May 2003.

_____
Jay R. Pollack
Administrative Law Judge

[5]If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "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."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT promulgate, maintain, or enforce any rule or policy which prohibits our employees from orally soliciting on behalf of Health Care Workers Union, Local 250, Service Employees International Union, AFL-CIO or any other labor organization, anywhere on nursing center premises other than immediate patient care areas, during times that neither the solicitor nor the person solicited is working or required to be working.

WE WILL NOT promulgate, maintain, or enforce any rule or policy, which prohibits our employees from distributing union literature in nonworking areas of our nursing center during employees' nonworking time.

WE WILL NOT threaten our employees that they will not receive planned pay increases because of the Union.

WE WILL NOT threaten employees with discipline for attendance offenses that previously involved no disciplinary action, because of the Union.

WE WILL NOT discriminatorily enforce our no distribution/no solicitation rules in retaliation for our employees' union activities.

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

Covent Care, Inc., d/b/a Emerald Gardens Nursing Center
(Employer)

Dated _____ By _____
(Representative) (Title)

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

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211

(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.