Methodist Hospital of Kentucky, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Cases 9–CA–27863, 9–CA–27932, 9–CA–27938, 9–CA–28003, and 9–CA–28041

September 15, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On July 8, 1994, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to the exceptions.

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,[1] and conclusions and to adopt the recommended Order.

The judge found that the Board should assert jurisdiction over the Respondent and that it committed various unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. We agree that the Board has jurisdiction and adopt the violations that were found by the judge, but with regard to the jurisdictional issue we provide further explanation.[2]

In determining that the Board should assert jurisdiction over the Respondent, the judge relied on several alternative grounds, including *Res-Care, Inc.*, 280 NLRB 670 (1986). Under the *Res Care* standard, the critical inquiry concerned whether the employer retained control over essential terms and conditions of employees' employment and examined the scope and degree of control exercised by the exempt entity over the employer's labor relations. Recently, in *Management Training Corp.*, 317 NLRB No. 190 (July 28, 1995), the Board majority overruled *Res-Care* and established a new test for the assertion of jurisdiction over employers who operate pursuant to contracts with exempt governmental entities. In *Management Training,* supra, the Board announced that jurisdiction over such employers will no longer be determined based on the standard set forth in *Res-Care* but rather, in determining whether to assert jurisdiction, we will now consider only whether the employer meets two criteria: (1) the definition of ''employer'' under Section 2(2) of the Act and (2) the applicable monetary jurisdictional standards.

Upon careful review, we find that the Respondent meets both criteria of *Management Training*. The Respondent, a nonprofit Kentucky corporation, operates a health care institution in Pikeville, Kentucky, providing both in-patient and out-patient medical and professional care services. The judge found that the Respondent received in excess of $250,000 in gross revenues during the 12-month period preceding the issuance of the instant complaint and also received at least $50,000 in goods and materials directly from outside the Commonwealth of Kentucky. We adopt these findings and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. Therefore, under *Management Training*, the Board may assert jurisdiction over the Respondent.

Moreover, even if we were to apply the *Res-Care* standard, the Board's jurisdiction over the Respondent is warranted here. The judge found that the Pikeville City Commission's resolution of January 14, 1991,[3] which the Respondent claims changed its relationship to the City and removed the Board's jurisdiction, was a sham transaction.[4] Based on the credited evidence, he further found that after January 14, 1991, the Respondent retained sufficient control over essential terms and conditions of employment to enable it to engage in meaningful collective bargaining. The record fully supports these findings.[5]

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

The Respondent does not except to judge's findings and conclusions pertaining to the employee support teams, the threats and no-talking rule issued by Supervisor Bob Ratliff, the threat by Supervisor Phyllis Bowling, and the poor evaluation given employee Judy Webb.

[2] Relying on *St. Francis Hospital*, 271 NLRB 948 (1984), we adopt the judge's conclusion that neither our prior determination in the related representation case nor Sec. 102.67(f) of the Board's Rules and Regulations bars our current consideration of whether the Board has jurisdiction over the Respondent. However, we find it unnecessary to rely on the judge's discussion of the purposes underlying Sec. 102.67(f), which appears in the last two paragraphs of sec. I,E, of his decision.

[3] The pertinent text of this resolution appears in sec. I,A, of the judge's decision.

[4] We find it unnecessary to pass on the judge's findings concerning whether the January 14, 1991 resolution is preempted by the Act and therefore void ab initio.

[5] Member Cohen would not rely on *Management Training*, supra, a case in which he dissented. Rather, he would apply the *Res-Care*, supra, standard. Member Cohen agrees with the judge that the City Commission's resolution was a sham and that the Respondent retained sufficient control over the terms and conditions of employment to enable it to engage in meaningful collective bargaining. Having concluded that the Respondent was subject to Board jurisdiction at all relevant times, and remains so, Member Cohen finds it unnecessary to decide the question of whether the Board would issue an in futuro remedial order against an employer who is no longer subject to Board jurisdiction because of events occurring subsequent to the commission of unfair labor practices.

Furthermore, in the alternative, we agree with the judge that the Board should exercise jurisdiction over the Respondent for the limited purpose of remedying the unfair labor practices, which occurred several months before the Pikeville City Commission attempted, albeit unsuccessfully, to remove the Board's jurisdiction by passing the January 14, 1991 resolution. See *Princeton Health Corp.*, 294 NLRB 640 (1989), enf. denied 939 F.2d 174 (4th Cir. 1991); *Children's Baptist Home*, 215 NLRB 303 (1974).[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Methodist Hospital of Kentucky, Inc., Pikeville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[6] Contrary to the judge's implication otherwise, the Board does not restrict jurisdiction over an employer to certain complaint allegations but rather our prevailing practice is to consider the whole case before us once jurisdiction is asserted.

James E. Horner and David Ness, Esqs., for the General Counsel.
Raymond C. Haley, III, Esq., of Louisville, Kentucky, for the Respondent.
Pamela T. Robinette, Esq., of Pikeville, Kentucky, for the Respondent.
Irwin H. Cutler, Jr., Esq., of Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on charges filed by the United Steelworkers of America, AFL–CIO–CLC (Union) between September 20 and November 19, 1990,[1] the Regional Director for Region 9 ultimately issued a second consolidated complaint and notice of hearing dated January 4, 1991, which alleges that Pikeville United Methodist Hospital of Kentucky, Inc., nee The Methodist Hospital of Kentucky, Inc. (Hospital or Respondent) committed a number of acts that violated Section 8(a)(1) and (3) of the National Labor Relations Act. Respondent filed timely answer to the complaint, admitting some allegations and denying others. The Respondent also challenges the Board's jurisdiction to hear and decide these matters.

The hearing was held in Pikeville, Kentucky, on May 18–26, 1993. Briefs and reply briefs were received from the parties on or before October 1, 1993. Based on the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

In its answer to the complaint, Respondent raised objections to the Board's exercise of jurisdiction in this case. Specifically, the Respondent questioned the Board's jurisdiction on the grounds:

1. That as an entity administered by individuals responsible to the electorate or to elected public officials, the Hospital is exempt from Board jurisdiction under Section 2(2) of the Act.

2. That as an entity regulated by the City of Pikeville, Kentucky, in matters of ''wages, hours and other terms and conditions of employment,'' the Hospital is precluded from meaningful bargaining over these matters requiring the Board to decline jurisdiction under Section 14(c)(1) of the Act.

3. That the revenues from operation of the Hospital are ''owned by the City of Pikeville, Kentucky'' thereby rendering the Hospital as not ''sufficiently engaged in commerce to warrant the [B]oard's exercise of jurisdiction . . . pursuant to Sections 2(6), and (7) and 14(c)(1) of the Act.''

4. That the Regional Director's Decision and Order in Case 9–RC–15808, dated July 3, 1991, precluded pursuit of the within unfair labor practice charges in accordance with established Board precedent.

The reference to Case 9–RC–15808 arises in connection with the Union's petition for the conduct of a representation election among ''All Non-Professional Employees'' of the Hospital. The petition was filed October 29. Following hearings regarding the appropriate unit in Case 9–RC–15808, in which the City of Pikeville, Kentucky (city), intervened, the Acting Regional Director for Region 9 issued his Decision and Order dismissing the petition on July 3, 1991. Therein, the Acting Regional Director, applying the Board's *Res-Care* doctrine,[2] concluded:

> Based on the foregoing and the record as a whole, and noting particularly that the [Hospital's] ability to bargain is limited by its obligation to submit any prospective collective-bargaining agreement to the City, an exempt entity, for approval, I find the [Hospital] lacks sufficient control over employment conditions to engage in meaningful negotiations. Accordingly, I conclude that it would not effectuate the purposes of the Act to assert jurisdiction herein and I shall dismiss the petition.

By Order of February 28, 1992, a three-member panel of the Board, Chairman Stephens dissenting in part, denied the Union's request for review of the Regional Director's Decision and Order. During the pendency of the Decision and Order, the Hospital moved for extension of the hearing date in the instant cases pending ''final resolution by the Board of the jurisdictional issue'' in Case 9–RC–15808. The motion was granted and an Order issued postponing the hearing indefinitely. On August 13, 1992, following the Board's denial of the Union's request for review of the Decision and Order in Case 9–RC–15808, the Board issued its order rescheduling hearing in these cases without comment regarding the ration-

[1] All dates are in 1990 unless otherwise noted.

[2] *Res-Care, Inc.*, 280 NLRB 670 (1986).

ale for doing so given the outcome of the underlying representation case.

On November 2, 1992, the Hospital moved for summary judgment as to the instant unfair labor practice cases relying on the lack of jurisdiction of the Board over its affairs as decided in Case 9–RC–15808. The Hospital further argued that principles established by Board precedent that might otherwise warrant the exercise of jurisdiction in these cases, despite the final outcome in the representation case, were inapplicable.

Both General Counsel and the Union opposed the Hospital's motion. On the Hospital's motion, the hearing date in these cases was extended pending the Board's disposition of the Hospital's Motion for Summary Judgment. By Order issued by Deputy Secretary Joseph Moore, and dated January 4, 1993, the Board denied the Hospital's motion seeking entry of summary judgment. After summarizing the arguments of all parties, the Order denying motion concluded:

> Having duly considered the matter, the [Hospital's] motion is denied because it raises genuine issues of material fact which would best be resolved after a hearing before an administrative law judge.

Following this Order, on January 25, 1993, the Regional Director issued an Order rescheduling hearing in the instant cases, giving rise to the instant proceeding.

A. *The Operative Facts Involved in the Jurisdictional Issue*

The Respondent has operated hospital facilities in Pikeville, Kentucky, since 1923. Until the 1960's, it operated a hospital at a different site than at present. In 1966, it purchased the premises of Appalachian Regional Hospital, and then entered into a series of transactions with the City of Pikeville enabling it to renovate and expand its building.

To comply with existing state law, the city created a holding company, the Pikeville, Kentucky Public Hospital Corporation (Corporation) to issue approximately 2 million dollars in tax-exempt bonds to finance the renovation. These would be paid off over 40 years. Additional funding was obtained through Federal, state, and regional grants, and from private donations. As part of these arrangements, the Hospital conveyed its ownership interest in the property to the city without retaining any reversionary interest. The city then deeded the property to the Corporation. The property is to be transferred back to the city when the bonds are redeemed and cancelled.

The parties also executed a series of leases. The Corporation leased the hospital facility to the city at an annual cost equal to the bond amortization rate plus related expenses. The initial lease period was for 1 year. The city was also granted ''an exclusive option . . . after the one year period, to renew the Lease from year to year, for periods of one year at a time, until July 1, 2009.'' The lease further provides: that the city is responsible for ''any and all taxes, charges, and assessments, if any, against the Hospital Project''; that the city will pay or ''cause to be paid'' all charges for utilities and services ''rendered or supplied to the City in connection with its use and occupancy of the Hospital Project''; that the city maintain, repair, and, if necessary, replace the Hospital Project premises; that the city assumes the Corporation's obligations, including the purchase of insurance on the premises and the adoption and approval of an annual budget; that ''Throughout the effective period of the lease, the Hospital Project will be operated under control and supervision of the city (either directly or by its sublessee) as a city governmental project; that revenues derived from operation of the Hospital project beyond what are necessary for its operation, bond amortization, and reserve fund establishment must be expended only to ''redeem or retire Bonds in advance of maturity,'' to finance additional ''capital improvements to the Hospital Project,'' or ''to enhance and improve the services and or facilities of the Hospital Project, as determined by the governing body of the City''; that the ''City will not expend any amount or incur any obligations . . . in excess of the amounts provided for current expenses in the current annual budget, except on proper justification and resolution by the governing body of the City''; that ''so long as any Bonds . . . remain outstanding,'' the city ''will perform or cause to be performed'' annual audits that ''reflect in reasonable detail the financial condition and records of the operation of said Hospital project,'' to be transmitted to and ''kept on file with the Trustee and in the office of the City Clerk''; that the city will cause rates and charges for services to be increased should it appear that ''gross income from the operation of [the Hospital] is insufficient to enable the City . . . to make any payment required under the sublease, the lease or the Mortgage Trust Indenture''; that ''the City will (directly or through it Sublessee) comply with all appropriate [F]ederal and State laws and regulations, including those applicable to the Hill Burton Act'' in connection with the operation of the Hospital; and that the city refrain from the establishment or use of any other hospital or hospital facilities so long as the lease is effective.

The city then executed a sublease with the Hospital, giving the Hospital exclusive control and supervision over the facility as long as it complied with all the sublease provisions.

The Hospital's annual cost is equal to the city's annual cost. All of these transactions were done solely to permit financing in the form of a bond issue for the construction of a new building and renovation of the existing building.

The sublease further provides that the ''Methodists (the Hospital) shall manage and operate'' the hospital facility, and ''supervise the operations of all the departments . . . pursuant to the directions of the City and with the requirements of all appropriate governmental regulations.''

Other relevant provisions of the sublease include: city approval of the annual budget of the Hospital, including any subsequent ''variations therefrom''; city approval of ''rates for the services and facilities'' charged by the Hospital, and any ''revisions in such rates''; the Hospital's deposit of ''all funds and revenues derived by the [Hospital] from the operation of the Hospital Project . . . in a revenue fund account of the City maintained in such bank(s) as shall be directed by the City,'' and subject to disbursement ''as contemplated by the . . . budget for the cost of maintaining and operating the Hospital Project, including all wages and compensation of operating personnel . . . insurance and workmen's compensation . . . premiums''; the city's right to direct the expenditure of excess revenues for early bond retirement, capital improvement of the hospital facility, or enhancement of ''services and/or facilities of the Hospital''; the city's right to require audits and to inspect the books of the Hospital;

and, the Hospital's covenants to remain a ''non-profit and tax exempt organization,'' as well as to ''continue to operate the property herein leased for the public purpose intended, as permitted by law.''

The legal significance of the various documents was given in the testimony of Charles Musson at the representation hearing. He testified that the method of financing involved herein is commonly referred to as a ''holding company bond issue,'' which, if pursued and implemented correctly, avoids the strictures of section 157 of the constitution of Kentucky. Section 157 regulates the incurrence of indebtedness by any ''county, city , town, taxing district or other municipality . . . .'' The holding company form of financing involves the creation of an alter ego corporation by a governmental entity which, in turn, issues bonds for what must be a ''public project.''

A public project under Kentucky law is defined as:

> [A]ny lands, building or structures, works or facilities (a) suitable for and intended for use as public property for public purposes or (b) suitable for and intended for use in the promotion of public health, public welfare, or the conservation of natural resources. . . .

''Hospitals and health care facilities'' are statutorily recognized as one form of ''public project'' for which a ''governmental agency'' may create a ''non-profit corporation to act as an instrumentality . . . in the financing of public projects.'' To qualify as a ''public project,'' the project must be owned by the governmental entity or its alter ego, thus the successive transfers of title from the Hospital to the city, then from the city to its alter ego, the Corporation. Not only must the project be owned by the governmental entity or its alter ego, but, additionally, all attributes of ownership must be exercised including control over the operation thereof. Such control over the operation of this public project, with regard to the bond issue, could have been exercised in one of two ways. First, the city could have relinquished control over the day-to-day operating affairs of the Hospital, retaining the right to terminate the sublease, essentially a management contract, for any reason on an annual basis. Alternatively, the city could retain directional and supervisory control over the hospital operation of the project.

The city, under the lease and sublease, did retain the right to terminate the lease with the Corporation, and did vest in the Hospital, under the sublease, the authority to manage the Hospital. On notice to the Corporation, at least 90 days preceding an anniversary date, the city may choose not to renew its lease for any reason, in which case both the city and the Hospital must surrender possession of the property to the Corporation. Should the city surrender its lease, the sublease automatically terminates and the Hospital loses all rights under the sublease.

The city did not, until it, through its Mayor, who is also chairman of the Hospital's board of directors, learned of the Union's organizing campaign exercise any direction or control over the Hospital's operation. Since that date, it has gone through the motions of approving whatever the Hospital has chosen to do.

Prior to 1990, the city approved the Hospital's annual budget only once, in the year the leases were executed. In June 1971, the Hospital's proposed budget for fiscal year 1972 was presented to the city commission and approved. That budget lists the Hospital's anticipated expenses only in general terms, with only a single line for all wages and a single line for all employee benefits. The minutes of that meeting reflect no discussion of the budget. The city never audited hospital costs or approved rates for patient services, despite sublease provisions requiring such actions.

On June 10, 1972, employees of the Hospital began a strike against the Hospital. A short time later, the strike was ratified by the Communication Workers of America, AFL–CIO (Communication Workers). The strike continued until October 1974, when the Communication Workers sent the Hospital a letter terminating the strike and making an unconditional offer to return to work. *Methodist Hospital of Kentucky*, 221 NLRB 692 (1975).

When the Hospital refused either to reinstate the striking employees or hire them as applicants for new employment, the Communication Workers filed unfair labor practice charges against the Hospital. While the strike was in progress, the National Labor Relations Act had been amended to give the National Labor Relations Board jurisdiction over nonprofit hospitals. Included in the nonprofit hospital amendments to the Act was a requirement that employees of health care institutions must give the institution and the Federal Mediation and Conciliation Service written notice of their intention to strike 10 days before commencing the strike. Because no such notice had ever been given, the Hospital moved for summary judgment in the unfair labor practice cases.

The Board held that the notice requirement was not applicable in that case because the strike had begun long before the nonprofit hospital amendments were enacted. On remand, the administrative law judge ruled that some of the Hospital's actions violated Section 8(a)(3) and (1) of the Act, and the Board agreed. *Methodist Hospital of Kentucky*, 227 NLRB 1392 (1977), enfd. in part 619 F.2d 563 (6th Cir. 1980):

> The Administrative Law Judge found, and we agree for the reasons fully set forth by him, that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the striking employees when vacancies arose on or about October 10, 1974. We therefore adopt his recommended Order requiring immediate and full reinstatement of the strikers to their former positions or, if those jobs not longer exist, to substantially equivalent positions without prejudice, and backpay for loss of earnings. We shall direct, in addition, that the Respondent discharge, if necessary to accomplish such reinstatements, all employees hired since October 10, 1974, the date of such application for reinstatement.

The Board also found that the Hospital had committed some additional violations of Section 8(a)(3) and (1) of the Act, beyond those found by the judge. Specifically, the Hospital refused to hire former strikers as new employees because they had ''engaged in union and/or protected concerted activity.''

In 1990 the Union began an organizing drive among the Hospital's employees. Because of certain actions taken by the Hospital during that drive, the Union filed a series of unfair labor practice charges alleging certain violations of Section 8(a)(1) and (3) of the Act. These charges were all filed

during the period from September 20, 1990, through November 19, 1990.

The Acting Regional Director for Region 9 issued a complaint against the Hospital on November 6, 1990, based on allegations made in Case 9–CA–27863. In its answer, the Hospital admitted to being an employer engaged in commerce within the meaning of the Act. It did not raise any challenge to the Board's jurisdiction.

The Acting Regional Director issued an order consolidating several unfair labor practice cases, and a consolidated complaint on December 20, 1990. In its amended answer to the consolidated complaint, the Hospital denied that it was an employer within the meaning of the Act, and alleged that it lacked sufficient control over employment relations to engage in meaningful bargaining. The Acting Regional Director later filed a second consolidated complaint. The Hospital repeated the denial of Board jurisdiction made in its answer to the first consolidated complaint.

The hearing on unit determination issues in Case 9–RC–15808 began on December 8, 1990, and was concluded on January 15, 1991. On December 10, 1990 (the Monday following the first 3 days of the hearing), a special meeting of the Hospital's directors was held because of the representation case. The directors passed a resolution to request the city to intervene in this representation case.

> Mr. Haley (at that time, counsel for the city): The purpose of the document is to indicate that the Methodist Hospital of Kentucky has asked the City to intervene in this proceeding.

Also on December 10, 1990, the city adopted a resolution authorizing its intervention in that case. Then, on the morning of January 14, 1991, at a special called meeting, the city commission passed a resolution effective immediately, allegedly pursuant to its authority retained in the sublease. This resolution reads:

> Whereas, the City of Pikeville, Kentucky, a Third Class City, created Pikeville Kentucky Public Hospital Corporation, a non-profit corporation of the City of Pikeville, Kentucky to hold title to all real estate and improvements located on the By Pass Road in Pikeville pursuant to the issuance of Revenue bonds in 1969, upon which real estate is located a hospital facility; and,
>
> Whereas, the City of Pikeville, Kentucky and its creation, Pikeville Kentucky Public Hospital Corporation, own the hospital facility; and,
>
> Whereas, the City of Pikeville, Kentucky, the Pikeville Kentucky Public Hospital Corporation and Methodist Hospital of Kentucky, Inc., a non-profit corporation, entered into a Sublease Agreement dated January 1, 1969, recorded in Deed Book 503, Page 134, which specifically sets forth that the City of Pikeville, Kentucky shall lease said real estate and hospital facility to Methodist Hospital of Kentucky, Inc, on an annual basis; and,
>
> Whereas, pursuant to said Sublease Agreement, Methodist Hospital of Kentucky, Inc., is authorized to manage and operate the hospital facility pursuant to the directions of the City of Pikeville, Kentucky; and,
>
> Whereas, the City of Pikeville, Kentucky has vital interests in the financial condition of the hospital facility including, but not limited to, the ongoing availability of affordable quality hospital services to citizens of the City and the surrounding area and the retirement of Revenue Bonds on which the City of Pikeville, Kentucky, is indebted through the year 2009; and,
>
> Whereas, the terms and conditions of employment, as well as the number of employees by category or classification of said hospital facility could critically affect said interests;
>
> Be it hereby resolved, that the City of Pikeville, Kentucky, by and through its authority retained in the Sublease Agreement, directs that its sublessor, Methodist Hospital of Kentucky, Inc., shall not enter into any contract of employment, whether individually extended or collectively bargained, nor shall it modify wage rates, hours of work or any employee benefit, whether pursuant to a written plan or practice, without the express written consent of the City of Pikeville, Kentucky or its designated representative.

The purpose of this resolution, according to testimony given at the representation hearing, was to preclude assertion of the board's jurisdiction over the Hospital. There was no evidence that the city was directly involved in the daily administration, operation or management of the hospital facility or influenced the Hospital's labor relations prior to 1991.

On the same day, the city commissioners passed another resolution designating Mayor May to be the person to oversee the Hospital's operation on behalf of the city.

The Acting Regional Director rejected the Hospital's claim to be a governmental agency or entity administered by individuals responsible to public officials, and thus concluded that the Hospital was an employer within the meaning of the Act. Relying on *Res-Care, Inc*., 280 NLRB 670 (1986), however, he concluded that the Hospital no longer retained control over the essential terms and conditions of employment, and that the purposes and policies of the Act would not be served by asserting jurisdiction over the Hospital. The Board refused to grant review.

A number of witnesses testified about this issue. Frank Carlton was the city manager for Pikeville from April 1, 1978, to about November 1, 1988. The mayor at that time was Dr. Hambley, a local physician. As city manager, Carlton ran the city in the mayor's absence.

The city had no special duties with respect to the Hospital during that time, other than by virtue of the Hospital being the city's largest customer for services. The city's only relationship to the Hospital was as a provider of municipal services. The only money it received from the Hospital was for payment of those services. The Hospital was no different than any other business operating within the city limits.

It had no responsibility for the Hospital's daily operations, did not review the Hospital's personnel policies, did not review the Hospital's discipline of employees; and was not responsible for the Hospital's hiring of new employees. It did not review any budget, or budget proposals from the Hospital. The city's audit did not include an audit of the Hospital, and the city received no audit of the Hospital.

The subject of ownership of the hospital was never brought to Carlton's attention, and was never raised during

a meeting of the city commission. The Hospital was discussed at the city commission only in connection with providing municipal services. Carlton does not recall any business from the Public Hospital Corporation having been brought before the city commission. Nor does he recall any Public Hospital Corporation officers being approved by the city commission.

Karen Wright Harris has been the clerk of Pikeville since 1988. It is her job to maintain the city's records. During her first year as clerk, the Hospital did not submit a budget to the city. Harris also does not recall any requests from the Hospital for approval of personnel matters in that year, nor any communication between the Hospital and the city commission. Even in 1989, the only matter concerning the Hospital that came before the city commission was the appointment of persons to fill vacancies on the board of the Public Hospital Corporation.

During the years 1988–1990, there were no requests from the Hospital for the city to approve any expenditures or to approve its budget. Audit reports indicate that the bond obligations were being kept current during those same years. With the exception of one time in the early 1970's, 1991 was the first year that the Hospital requested city approval of its budget.

The city commission has dealt with a multitude of subjects over the years Harris has been clerk, including work on the Peach Orchard guard rail, transfer of a cable franchise, selling a riding mower, and setting the date for Halloween. The only discussions of the Hospital she could find in city records, however, pertained to providing municipal services to the Hospital. Even during 1991–1993, Harris could find no open vote by the city commission regarding any of the Hospital's personnel matters.

According to Harris, the city's records include a number of documents pertaining to the Hospital that go back earlier than 1991. She could not say, however, when those documents were obtained by the city. There was no evidence that any of those documents were provided to the city prior to January 1991.

Thomas Webb Huffman served as an elected city commissioner from 1988 to 1990. During his term the Hospital did not come before the city commission for any reason. The subject of the Hospital, however, did come up. The city commissioners during this period studied the various city committees and boards looking at how long a term each committee's or board's members served. The commissioners' study reached the hospital board, but the Commissioners were told by the then Mayor Hambley, that this Board was separate and had nothing to do with the city. The Mayor, who had served in that position for about 25 years, was a physician working at the Hospital. At no time while Huffman was a commissioner did the city exercise any authority over the Hospital. It did not deal with personnel or budget matters of the Hospital and did not approve the Hospital's budget or study or audit its finances. To the best of Huffman's knowledge, the Hospital was operated by the Methodist hospital administration board. There are two boards affecting the Hospital. One is its board of directors and the other a city board, the Pikeville Kentucky Public Hospital Corporation. The members of the latter board were initially appointed by the city, and thereafter internally filled vacancies as they occurred.

It is Huffman's understanding that the city owns the real estate and improvements that make up the physical Hospital. It is his belief that this property will revert to the Methodist Church when certain bonds are fully paid. He received this information from among others, Mayor Hambley. He believes that the Church gave the Hospital to the city to be able to secure financing through the city.

Dr. John L. Tummons was the Hospital's administrator at the time of the representation case hearing. He had been the administrator since about October 1989. As administrator, Tummons managed the Hospital's operations, and was answerable only to its board of directors. Policies pertaining to the performance of each department's work were, at least in part, a responsibility of each department director. Labor relations policies, however, were developed by the Hospital's administrator, and applied uniformly to all hospital employees.

> Q. Could you give us a little bit more detail about your input and your formulation into the policies and procedures of the hospital insofar as they relate to labor relations?
>
> A. As far as all the personnel policies are concerned, they're my responsibility. I'm responsible for developing those and implementing those.

Tummons, with the assistance of his subordinates, essentially rewrote the book on employee relations policies to make them uniform throughout the Hospital's operations.

Only Tummons had authority to change those uniform policies and procedures.

> Q. Now, Dr. Tummons . . . is there any—does anyone have any authority to change any of the policies or procedures set forth in this manual other than yourself?
>
> A. No, they do not.

That authority was also spelled out in policy number 1.2 of the policy and procedure manual.

Tummons was also responsible as Administrator for the Hospital's ''salary and budget pay system, all as set forth in policy number 302.2 of the policy and procedure manual.''

> Q. So, is it fair to say, Dr. Tummons, that you're responsible for the establishment of all wage rates in the Hospital?
>
> A. Yes, final authority for those, yes.
>
> Q. Is it fair to say that you're responsible for the creation of any new jobs at the Hospital?
>
> A. Final authority for those, yes.
>
> . . . .
>
> Q. Any changes in pay scales or overall compensation system, that is your final authority to make those changes?
>
> A. Yes.

Once Tummons was hired, he learned that several areas of the Hospital's operations were ''grossly understaffed'' due to a lack of recruiting. In most cases, there were not enough people to fill all of the available positions. Because of the ''desperate shape'' they were in, Tummons made some key changes. He implemented a program that would pay a ''recruiting'' bonus to any employee who successfully recruited a new employee, and a ''sign in'' bonus of $2000 for certain categories of new employees. To receive the ''sign in''

bonus, the new employee was required to work for the Hospital for 1 year, or pay back a prorated share of the bonus.

Juanita Deskins has been the Hospital's personnel director since December 1990, and was the acting personnel director from July until December 1990. Prior to that she had been the personnel assistant since 1980. Deskins stated that the Hospital has submitted information to the city regarding personnel matters. In 1992, the Hospital first sought city approval before hiring if the job involved an exception to the Hospital's budget. The city also approved hires that were within the budget. This was not done in 1990.

During 1992, the Hospital hired 150–200 employees. Deskins could not say how many of these involved exceptions to the budget, but that more than one or two hires were involved. She did not know of any instances in which Walter May or the city commission had rejected a proposed personnel action. If an exception to the budget was involved, the Hospital might be asked to submit more information. This additional documentation would not be needed if the hire was within the budget.

According to Deskins, the Hospital's administrator has the final decision on terminations. He has final authority to settle, deny, or act on grievances. He is also responsible for the overall compensation program. He also has final authority to clarify the personnel policies. In 1990, he could and did exercise extensive authority to make changes in the Hospital's personnel policies. In 1990–1991, he had the final authority to approve the decision to fill a particular position.

Prior to 1991, a request for personnel would be submitted to the administrator. When he signed it, no more was needed to be done. Sometime in 1991, a new form was adopted. Deskins prepared the form that included on it a place for the city's mayor to sign. She was told by Dr. Tummons, then the Hospital's administrator, that the city's mayor had to sign off on those forms. She submitted this form for all of the employees hired in 1992. Walter May, who is both mayor and chairman of the Hospital's board, attended personnel committee meetings. Deskins had no direct conversations with May, however, about personnel matters.

Walter E. May

May took office as mayor of the city in January 1990 and was the City's mayor at the time of hearing. Pikeville has a city manager form of government, with the day to day operation of the city being the responsibility of the hired manager, with policies and guidelines being set by the elected city commission and mayor. The commission consists of four commissioners and the mayor. May is also a member of the Hospital's board of directors and became its chairman in 1990.

None of the members of the Hospital's board are appointed by the city or any government official. Until September 1991, the Hospital's board members nominated and selected new members, subject to approval by the Kentucky annual conference of the United Methodist Church. Since September 1991, 15 hospital board members are elected by the hospital board and 9 are elected by the annual conference of the Church.

All members of the public hospital corporation's board initially came from the Hospital's board. Even now, most members of the public hospital corporation's board are also members of the Hospital's board. The Hospital's board is much larger, however, so there have always been members of it who are not also on the public hospital corporation's board.

May is not aware of any requirement that members of the public hospital corporation's board also be members of the Hospital's board; when he testified at the representation case, however, all but one member of the public hospital's corporation's board had also been members of the Hospital's board. The sole exception had been a person who served on both boards, and who then resigned from the Hospital's board.

Neither the city nor the public hospital corporation has performed any independent audit of the Hospital. The city commissioners, since 1991, have relied on the audit performed by the Hospital. Prior to that they did not see an audit of the Hospital. The Hospital does not turn over any profits to the city, nor does the city write any checks to finance the Hospital's operations. The person who writes payroll checks for city employees is not the same person who writes the payroll checks for hospital employees. The city employees receive different benefits than the hospital employees.

Although the city approved the Hospital's budget in 1991, May stated he did not know whether this had been done prior to the union campaign. He had previously testified that this had not been done prior to the union campaign, and he did not question the accuracy of his prior testimony. He also agreed that there was not much presented to the city commission by the Hospital prior to the union campaign. In 1990, for example, the city did not approve hiring, promotions, disciplinary actions, applications for leave, changes in duties or classifications, or other matters pertaining to the Hospital's labor relations. Prior to the union campaign, doctor's contracts were also not presented to the city commission for approval.

May is personally adamantly opposed to the unionization of any of the Hospital's work force. An indication of the depth of this opposition can be gleaned from his testimony about how he became aware of the involved union campaign. May first learned of the union organizing efforts in the summer of 1990. He described learning of it in the following manner.

> I think my first hint that there was any union activity at the Hospital—organizing activity—and, this would have been in August or September of 1990—I was having dinner one evening in Pikeville, with my son. And, there were a couple of men, who were sitting in the restaurant, who kept glaring at me, and, seemed to be trying to make me uncomfortable, for some reason. They were strangers. I didn't know them. I didn't mention it to my son. I didn't want him—to have him particularly concerned about it. But, as soon as we left there, I made an effort to find out who these people were. I found out that one of them was an organizer for the United Steelworkers. . . . Because it was in a hotel coffee shop, I asked the owner of the hotel, if he knew who they were. I, also, asked the police chief, if he knew who they were. They did not seem like people that particularly liked me, and, I was just picking up bad vibes from them. [The chief of police] . . . confirmed pretty much what I said. He gave me the name

of the person, and that they were working for the United Steelworkers.

The police chief, who did not know the people's identity when initially asked by May, evidently had the men stopped and required to identify themselves.

May mentioned the presence of the union men to then Hospital Administrator Tummons. He told him, ''I made it perfectly clear to Dr. Tummons, that we did not want to have a union representing our employees.'' May was then a member of the Hospital's public relations committee. This committee attempted to become involved in decisions regarding the union campaign, but its efforts were, without exception, dismissed by Tummons as unnecessary. The committee got little information from Tummons.

According to May, that was Tummons' attitude on just about anything regarding the Hospital's operations. Tummons did many things without ever going to the Hospital's board. For example, he revised the Hospital's personnel policies, often without requesting the hospital board's approval.

As noted earlier, on January 14, 1991, the city commission passed a resolution purportedly prohibiting the Hospital from entering into a collective-bargaining agreement. On the same day, the city commissioners passed another resolution designating Mayor May to be the person to oversee the Hospital's operation on behalf of the city.

On February 25, 1991, the city commissioners passed a resolution requesting the Hospital to rescind certain of its bylaws that the city believed might be in violation of certain laws and further requested that the Hospital notify them when it took the requested action. The Hospital took this action in April 1991.

When asked whether the January 14, 1991 resolution restricting collective bargaining was passed because of the Union's campaign, May said the answer is ''both yes and no.'' He said the resolution was passed because the city did not want the Hospital to recognize a union. He agreed that it was passed ''because the Steel Workers Union filed a petition with the National Labor Relations Board.'' He agreed that one of the reasons for adopting the resolution was to defeat the jurisdiction of the NLRB. The Regional Director so found in his Decision and Order resulting from the representation case. It was passed at a special meeting called on the morning of January 14, 1991, in order to be used as evidence in the representation case that afternoon.

Later in January 1991, May sent a letter to all hospital employees in which he disavowed any intention by the city:

> [T]o run the hospital on a day-to-day basis. This is inaccurate and a gross distortion of the realities of the situation. The fact is that the City of Pikeville has since 1971 been under a contract with the Methodist Hospital of Kentucky to operate the hospital. That contract remains in full force and effect. Under that contract, you have been an employee of the Methodist Hospital of Kentucky. Nothing has been done to change your employment relationship with the Methodist Hospital of Kentucky.
>
> Under this contract, the City of Pikeville retained authority with regard to the overall operation of the Hospital. As a result of the union representation petition, the City of Pikeville and the Methodist Hospital of Kentucky simply brought this contractual authority of the city to the attention of the National Labor Relations Board. However, this authority of the city is nothing new. The city has had it ever since the financing for the hospital construction twenty years ago. A portion of that debt is still outstanding.

This letter appeared under the city's letterhead, and was signed by May as the city's mayor.

May, in his dual roles as hospital board chairman and mayor continued to use the January 14, 1991 resolution purely to avoid Board jurisdiction. In 1990, a dispute arose between the Hospital and the Kentucky annual conference of the United Methodist Church, which continued on into 1991. During the course of the dispute, Reverend Sewell Woodward, a representative of the annual conference, asserted that the Church owned the Hospital and would sell it if the Hospital directors did not agree to changes in the Hospital bylaws that the annual conference required. During the course of the dispute, there was a series of meetings and an exchange of correspondence between representatives of the annual conference and of the Hospital. On April 1, Glen S. Bagby, apparently a representative of the annual conference, wrote to Pamela Robinette, attorney for the Hospital, in which he noted:

> My understanding is that your hospital board is composed of approximately 3/4 United Methodists, and my understanding (and all of these understandings are basically from you and Mayor May) would rather leave the ''ownership of the property'' issue on the shelf during the current labor dispute and until it is resolved, assuming for the moment, that this is a successful defense. This appears to also be what Mayor May desires to do.

Robinette promptly forwarded this letter to May, but May never told Bagby that that understanding about the ownership of the Hospital was incorrect. In April 1991, the representation case was still pending before the Board.

According to May, the Hospital now approves pay increases subject to the city's approval. Personnel matters are likewise voted on by the Hospital's board, and then referred to the city. Yet regardless of the volume of paper sent from the Hospital to the city since 1991, it still appears that the Hospital is running its operation on it own, and the city is merely rubber stamping its approval on anything the Hospital either does or wants to do.

Shortly after January 14, 1991, Deskins was told to submit a form to the hospital administrator for the hiring of any employee, with a place for the mayor to indicate his approval. She developed such a form. The form includes all employees, from the lowest paid to the highly compensated. Although the form includes the rate of pay for hourly employees, it does not contain the rates of pay for the more highly compensated salaried employees, an omission that belies any serious concern by the city about the cost of operation of the Hospital.

A review of the many documents, which comprise Respondent Exhibit 53, shows that beginning in the fall of 1992 there begin to appear more written requests for greater detail in documentation. The Order in this case setting the second amended consolidated complaint for trial is dated August 13, 1992. As the Hospital realized that it would actually be

going to trial in these unfair labor practice cases, it appears that it began to document its file more completely than previously. Beginning about October 15, 1992, the Hospital began for the first time to send transmittal letters to Mayor May along with the ''Approval Sheets.'' May was, from 1990 until his testimony in this case, chairman of the Hospital's board and a member of the Hospital's executive committee. As such, he already had the information that his subordinate, the Hospital's administrator, communicated to him in his capacity as Mayor. On some documents on city stationary, regarding the Hospital's termination of some employees, May signed as chairman of the Hospital's board. He admitted that his multiple roles sometimes caused confusion.

B. *Is the Hospital a Political Subdivision of the City of Pikeville Within the meaning of Section 2(2) and Exempt from the Board's Jurisdiction?*

Section 2(2) of the Act, expressly exempts from coverage, ''any state or political subdivision thereof . . . .'' The political subdivision exemption:

> [T]raditionally has been limited to (1) entities that are created directly by the State, so as to constitute departments or administrative areas of government, or (2) entities that are administered by individuals who are responsible to public officials or to the general electorate. [*Prairie Home Cemetery*, 266 NLRB 678 (1983), citing *Wordsworth Academy*, 262 NLRB 438 (1982), and footnoting to *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971).]

Respondent concedes that the Hospital, a separately incorporated nonprofit organization was not ''created directly by the State,'' and, is not exempt from jurisdiction on that basis. It does contend that under the circumstances of this case, however, the terms of the sublease awarded by the city to the Hospital, and the city's participation in its affairs, demonstrate that the Hospital is and has always been subject to the plenary control and direction of elected and/or appoint officials of the city, and thus is an entity administered by individuals who are responsible to public officials within the meaning of the second test for exemption articulated in *Wordsworth Academy*, supra.

It also contends that the Hospital was directly created by the city. This is patently incorrect and an erroneous change in its position in the representation case. This matter was ruled upon correctly by the Regional Director in his Decision and Order of July 3, 1991. Therein he found:

> The Employer and City concede that the Employer, a nonprofit corporation in existence since 1923, was not created by the City or any other governmental entity and thus is not exempt from jurisdiction on that basis. The Parties contend, however, that the Employer shares the City's exemption under the second prong of the test based on the participation and control exercised by public officials and/or their appointees in the Employer's operation. The argument offered in support of this assertion is not persuasive.
>
> Although some public officials (i.e., the Mayor) and representatives of the Public Hospital Corporation are members of the Employer's board of directors, they are not subject to confirmation by the City and do not serve as a consequence of any local ordinance. The record discloses that the City has no authority to decide the composition or structure of the Employer's board of directors which is, in essence, its policy-making body. Clearly, neither the board of directors itself nor the individual members in their capacity as board members have direct personal accountability to the City or the general public. See, *Morristown Hamblen Hospital Association*, 226 NLRB 76 (1976); *Cape Giradeau Care Center*, 278 NLRB 1018 (1986).
>
> The parties also contend that the City's primary control over the Employer's management of the hospital as enumerated by the sublease's various provisions are sufficient to warrant a finding that the Employer shares the City's exempt status. As evidence of its plenary control, the city notes that should the Employer fail to comply with the terms of the sublease, the City may immediately terminate the Employer's right to manage the publicly-owned facility and may, in fact, cancel at its option for any reason prior to the sublease's next renewal. The City's Contractual rights, vis-a-vis the Employer, however, pertain to the manner in which the Employer is required to provide services rather than defining its existence as an exempt entity.
>
> Accordingly, based on the foregoing and the record as a whole, I find that the Employer is not a governmental agency or an entity administered by individuals responsible to public officials and thus is an employer within the meaning of Section 2(2) of the Act.

I concur.

C. *Is the Hospital Exempt from the Board's Jurisdiction Due to Its Inability to Engage in Meaningful Collective Bargaining?*

Respondent takes the position that it will not effectuate the policies of the Act for the Board to exercise jurisdiction in this case, given all the circumstances. In his Decision and Order of July 3, 1991, the Regional Director held:

> In *Res-Care, Inc*., 280 NLRB 670 (1986), the Board concluded that the decision whether to assert jurisdiction over an employer providing services to an exempt entity must focus on the control retained by the employer with respect to ''essential terms and conditions of employment.'' If the exempt entity possesses ultimate discretion over basic economic terms, then the employer cannot engage in meaningful collective bargaining and assertion of jurisdiction is not warranted.
>
> The Employer's sublease with the city specifically provides that the management, operation and supervision of the hospital shall be ''pursuant to the directions of the City.'' Such language, standing alone without any evidence of the city's participation in, or approval of, the Employer's labor relations matters, does not constitute the type of control necessary to demonstrate that the Employer lacks the capacity to engage in meaningful bargaining. Nevertheless, given the city's recent resolution requiring the Employer to obtain its express written consent in order to ''enter into any contract of employment whether individually extended or

> collectively bargained, nor . . . modify wage rates, hours of work or any employee benefit,'' it is clear that the city now acts in a controlling rather than advisory capacity with respect to wages, benefits, and personnel policies. See, *Board of Trustees of Memorial Hospital v. NLRB*, 624 F.2d 177 (10th Cir. 1980), cited by the Board in support of its rationale in *Res-Care, Inc*., supra at 673.
>
> The Board will not assert its jurisdiction over an employer in circumstances when an exempt governmental entity has the right of disapproval over a collective-bargaining agreement entered into by the employers. See, *Board of Trustees of Memorial Hospital*, supra; *Ohio Inns*, 205 NLRB 528 (1973).
>
> The Petitioner asserts that the contractual relationship between the Employer and city did not previously involve any approval by the city of the Employer's labor relations and the resolution asserting such control is a sham transaction devised to evade the Board's jurisdiction. The Petitioner has not, however, offered any evidence demonstrating that the city will not exercise the right of approval that it has recently claimed or that its approval of the Employer's personnel policies in the future will be routinely granted.

Based on this rationale, the Regional Director concluded that the Board should decline to exercise jurisdiction. I disagree. I believe that the city's January 14, 1991 resolution was preempted by the Act, and that the evidence reflects that the city's control is a sham designed solely to defeat the Board's jurisdiction, based on its continued routine approval of the Hospital's operation.

The city commission's resolution of January 14, 1991, is preempted by the Act

It should be noted at the outset that this is not the first time the Respondent has been involved in a Board proceeding. On June 10, 1974, Respondent's employees went out on strike. On August 24, 1974, the new amendments to the Act, creating the new Section 8(g) became effective. A complaint issued over that strike and it was Respondent's contention that there was no merit to the complaint because the striking employees had not complied with the requirements of the new Section 8(g). The involved administrative law judge ruled in 221 NLRB 692 (1975), that the Board did have jurisdiction over Respondent, finding that it was an employer within the meaning of Section 2(2) and (14) of that Act. The case was remanded by the Board to the administrative law judge, who again found Respondent to be an employer within the meaning of the Act. (227 NLRB 1392 (1977).) On appeal by the Respondent, the U.S. Court of Appeals for the Sixth Circuit affirmed the Board's decision in pertinent part at 619 F.2d 563 (1980).

There was no change in the Respondent's status vis-a-vis the City of Pikeville from the time the Board previously found Respondent to be a statutory employer until January 1991, a date after all of the alleged violations of the Act had occurred. The changes that took place after January 1991 had as their admitted purpose the removal of Respondent from Board jurisdiction to avoid having its employees having the right to choose a union to represent them. Mayor May stated that when he first learned of the current organizing campaign, he went to Dr. Tummons and ''made it perfectly clear to Dr. Tummons, that we did not want to have a union representing our employees.'' Prior to that date, the city government had totally ignored the operations of Respondent. Only after gaining knowledge of the organizing campaign did the Hospital seek protection behind the facade of city control of its operations. I agree with the Charging Party and the General Counsel that even the post-January 1991 actions designed to show city control are only an illusion and not a reality. May had himself designated by the city commission to act in its stead to oversee the Hospital's operation. He was already doing that in his capacity as chairman of the Hospital's board of directors. All of the matters involving the Hospital's budget and its personnel actions that he had sent to him as Mayor were available to him prior to their being sent, and at least with respect to the budget, had his prior approval as chairman of the board. May, as Mayor, and/or the city commission did nothing thereafter but grant routine approval of the Hospital's actions or requests for action.

As noted earlier, prior to January 1991, the city government had totally ignored the operations of Respondent. When Mayor May was asked if Respondent had ever sought approval from the city commission for changes in room charges—before the organizing campaign—May replied, ''I don't think they (the Hospital) were presenting much to the city commission at all, prior to that—no.''

The General Counsel contends that the city commission's resolution of January 14, 1991, expressly passed for the purpose of ousting the Board from jurisdiction, is preempted by the National Labor Relations Act, and that that resolution prohibiting Respondent from entering into a collective-bargaining contract is void ab initio. The General Counsel points out that the Supreme Court has developed two lines of preemption doctrine in Federal labor law. The first applies to state laws that would affect conduct arguably protected by Section 7 or prohibited by Section 8 of the Act and, therefore, subject matter that is within the primary jurisdiction of the Board. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), where the Court held, at 244–245, ''when an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if danger of state interference with national policy is to be averted.'' The Court in *Garmon* set out two exceptions to the preemption of state regulation of conduct: (1) activity of merely peripheral concern to the NLRA; or (2) conduct that touches ''interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that congress had deprived the states of the power to act.'' 359 U.S. at 244. (Footnote omitted.) The second doctrine proscribes state intervention in labor relations that Congress intended to leave unregulated, i.e., recourse by both the employer and union to self-help. See *Machinists v. Wisconsin Employment Relations Commission*, 476 U.S. 132 (1976).

In the instant cases, the city commission has deliberately interposed itself between Respondent and the Union in an effort to deprive employees of their rights guaranteed by Section 7 of the Act. Mayor May admitted that such was the purpose of the resolution passed by the city commissioners. Therefore, the *Garmon* principle of preemption operates to preclude the city government from now legislating in this

area. The city commission had refrained from involving itself in the internal affairs of the Hospital prior to the passage of this resolution, and subsequent to its passage there is no evidence that the operation of the Hospital has changed in any way. Thus, these cases are controlled by *Division 1287 v. Missouri*, 376 U.S. 74, (1963), in which the Supreme Court struck down a Missouri law permitting state seizure of struck public utilities, noting, ''Missouri, through the fiction of 'seizure' by the state, has made a peaceful strike against a public utility unlawful, in direct conflict with federal legislation which guarantees the right to strike.'' Of particular relevance to the instant cases is the Court's statement that:

> Whatever the status of the title . . . acquired by the State as a result of the Governor's executive order, the record shows that the State's involvement fell far short of creating a state owned and operated utility whose labor relations are by definition excluded from the coverage of the NLRA. The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties . . . Missouri did not participate in any way in the actual management of the company, and there was no change of any kind in the conduct of the company's business. As summed up by the Chairman of the State Mediation Board: ''So far as I know the company is operating now just as it was two weeks ago before the strike. [Id.]

The city commission's resolution is also preempted even if it is more narrowly viewed as the city commission's effort to give the Respondent added economic leverage if faced with increased employee demands as a result of the Union's organizing campaign. The city commission's conduct, viewed thusly, is similar to an attempt by the Los Angeles city council to condition a taxicab franchise renewal on settlement by the taxicab company of a labor dispute it had with a union. In finding the city council's action preempted, the Supreme Court stated:

> Free collective bargaining is the cornerstone of the structure of labor relations carefully designed by Congress when it enacted the NLRA [citations omitted]. Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations. [Citations omitted.] A local government, as well as the Labor Board, lacks the authority to ''introduce some standard of properly balanced bargaining power'' [citations omitted . . . The settlement condition imposed by the Los Angeles City Council . . . destroyed the balance of power designed by Congress . . . *Golden State Transit Corporation v. Los Angeles*, supra, at 619 (1986).

By limiting Respondent's power to engage in collective bargaining, the city of Pikeville has attempted to prevent or warp a bargaining relationship, which is otherwise protected by Sections 7 and 9 of the Act.

Though the city commission resolution spoke of the city commission's concerns about the effect on the city of the terms and conditions of Respondent's employees, this assertion does not permit the city commission or the Respondent to claim that the employees' terms and conditions of employment are so deeply rooted in local sentiment as to bar preemption. Because employees' terms and conditions always affect the economic health of local communities and governments, such an interpretation would permit the exemption to the preemption doctrine to swallow the doctrine whole.

Moreover, the city commission's assertion of its purported interest is itself a sham, given the fact that although the city commission has had a longstanding interest (since 1971) in the economic health of the Respondent, the city commission has not protested Respondent's failure to submit its budget to the city on an annual basis despite such a requirement in the city/Respondent sublease. Finally, even when asserting a sudden interest in Respondent's economic status, the mayor/chairman of Respondent's board admitted, during the representation hearing, that he did not know whether Respondent was meeting its other financial obligations. He also admitted that Respondent could enter into contracts for goods or service, both of which could have significant financial impact, without the approval of the city. Thus, the resolution was not intended to give the city commission effective control over Respondents' operations, but rather, it was intended to deprive employees of their Section 7 rights. Moreover, preemption doctrine aside, it is very questionable whether the sublease gives the right to the city commission to pass such a resolution. Barring entering into a collective-bargaining agreement is certainly not a right specifically retained by the city in the sublease. And it is not a legitimate concern under the sublease. The city has a legitimate interest in having the bonds paid off, and very little else under the sublease.

The Board is not prohibited from voiding an improperly motivated action that if properly motivated and implemented would have deprived the Board of its discretionary jurisdiction. In *Bishop Randall Hospital*, 233 NLRB 441 (1977), the Board found it had jurisdiction over a private employer, the Lutheran Homes and Hospitals Society (the Society), which leased and operated a hospital from a public board of trustees, that board being appointed by county commissioners pursuant to a Wyoming statute. Jurisdiction was asserted over the employer even though the leases had been amended after a union was certified as the collective bargaining representative of the hospital's nurses. It was noted that while the amendments purported to relieve the Society of much of its control over labor relations, in reality there was no evidence that the operation of the hospital actually changed. The Board affirmed the ALJ's finding that:

> [E]ven were it presumed the existence of the new or additional powers granted by the Society to the Trustees under the . . . lease amendments are sufficient indicia of increased control over the former by the latter to warrant the Board's declination of jurisdiction as a general premise, I would nevertheless find under the circumstances of this case such jurisdiction should be exercised. The Board and the Federal Courts have consistently held a respondent may not circumvent the issuance of an order designed to remedy its conduct violative of the Act by interposing a contract it has executed, without regard to the apparent (on its face) legality of the contract in question. [Id. at 446.]

Although the City of Pikeville may have at some point lawfully carried out what it pretends to carry out at the urg-

ing of Mayor May in the instant cases, it may not now on behalf of Respondent interpose its tainted resolution to deprive the Board of jurisdiction because unit employees have exercised their Section 7 rights to respond to the Union's organizing campaign. See *Parma Industries*, 292 NLRB 90 (1988); *Strawsine Mfg., Co*., 280 NLRB 553 (1986). For the reasons set forth above, I find that the January 14, 1991, city resolution was void ab initio, and the facts of these cases support assertion of Board jurisdiction under *Res-Care Inc*., supra, and its companion case *Long Stretch Youth Home*, 280 NLRB 678 (1986).

In *Res-Care*, the employer operated a residential job corps center under a ''cost-plus fixed fee contract'' with the Department of Labor. Before awarding the contract, DOL had to approve the employer's budget line by line. Once the contract was in force, any changes in the employees' wages or benefits had to be approved by DOL, and if DOL disapproved of these additional expenditures for wages or benefits, it could reduce the contract payment to the employer. Under these circumstances, the Board found it would not effectuate the purposes of the Act to assert jurisdiction over this employer. In *Long Stretch*, supra, which involved a residential facility for teenage boys, the Board distinguished *Res-Care* and asserted jurisdiction over the employer since, although the Long Stretch facility was required to submit salary and benefit proposals to the state agency and to provide certain benefits, the agency did not control the exact levels of wages and benefits. Moreover, the employer's funding in *Long Stretch*, was not ''cost plus,'' as in *Res-Care*, but rather per resident, and thus was not directly tied to the wage and benefit levels submitted to the agency.

As the Regional Director stated in his representation decision, prior to the passage of the offending resolution on January 14, 1991, ''there is no evidence that the city was directly involved in the daily administration, operation or management of the hospital facility or influenced the Employer's labor relations.'' Further, while the sublease requires annual audits of the Respondent's budget, with the exception of the first year of the lease (1971), there has been no city audit of hospital costs or city approval of rates for patient services. It should also be remembered that the city is not providing the money to fund the Hospital as was the agency in *Res-Care*. It should also be noted that Mayor May specifically informed the Hospital's employees in his January 1991, letter, that the city's actions did not constitute a change in their relationship with the Hospital or the Hospital's relationship with the city.

Although the sublease provides that the management, operation and supervision of Respondent shall be ''pursuant to the directions of the city,'' there is absolutely no evidence that prior to 1991, the city commission ever exercised any direction over Respondent's labor relations. There is no convincing evidence that subsequent to 1991 that the city has actually exercised any control over any aspect of the Hospital's operation, save for having it file numerous documents which May routinely approves, having previously approved, or known of the action they represent in his role as board chairman. In *Florence Hicks*, 302 NLRB 762 (1991), the Board asserted jurisdiction over an employer, notwithstanding that a government contracting officer retained the authority to disallow costs that increased from the initial proposal, where the evidence indicated that the authority was not routinely exercised. In so finding, the Board stated, supra at 765, ''[A]n employer seeking to avoid the Board's exercise of jurisdiction carries the burden of showing that it is not free to set the wages, fringe benefits, and other terms and conditions of employment for its employees.'' Consistent with this precedent, the mere language in the sublease that the operations of Respondent will be ''pursuant to the directions of the city,'' is insufficient to carry the burden of establishing the requisite degree of control of its labor relations by the exempt entity. Having found the city commission's January 14, 1991, resolution void, I find that the Board should exercise its discretionary jurisdiction under *Res-Care*.

D. *Should the Board Exercise Jurisdiction for the Limited Purpose of Remedying the Unfair Labor Practices Found to Have Been Committed by Respondent?*

Although I recommend that the Board exercise its discretionary jurisdiction over Respondent, assuming it decides not to do so, I would recommend that it at least exercise jurisdiction for the limited purpose of remedying the unfair labor practices that I have found Respondent engaged in. In this case, the Board's decision in the representation case was based primarily on the city's resolution in 1991, after the unfair labor practices at issue here had already been committed. Even assuming that resolution was not preempted by the Act, the circumstances that justified the Board's decision in the representation case did not exist until after the unfair labor practices had already been committed. Prior to that time, the Hospital and its employees were clearly under the Board's jurisdiction. This is evident both from the prior unfair labor practice case involving the Hospital, and from its answer to the first unfair labor complaint issued herein. In its numerous memorandums or letters to employees issued at the time of the commission of its unfair labor practices, Respondent did not even hint the Board might not have jurisdiction, and I believe it should be estopped from asserting this claim, at least with respect to the unfair labor practices involved in this proceeding.

The Hospital implies that the Board must look to a subsequent determination not to exercise jurisdiction to decide whether or not to exercise jurisdiction over prior unfair labor practices. It relies on *Screw Machine Products Co*., 94 NLRB 1609 (1951), for this proposition. The facts in that case, however, are distinguishable.

In *Screw Machine Products Co*., supra, the Board had twice decided that the employer did not meet its monetary jurisdictional standards. One determination occurred before the unfair labor practice charges had been committed, and the second occurred shortly after those unfair labor practices, as part of the same organizing drive.

There was no evidence that the employer had ever satisfied the Board's jurisdictional standards, much less that the Board's decision in the second representation case was affected by events that had occurred since the unfair labor practices were committed. Furthermore, the decision not to exercise jurisdiction was based on the amount of business being done, rather than on actions taken in order to remove the Hospital from the Board's jurisdiction.

In this case, however, the decision in the representation case was based on actions intended to remove the Hospital from the Board's jurisdiction, and to alter the outcome of the

representation case. Those actions were all taken after the unfair labor practices had already been committed. Prior to these actions, the Board had previously asserted jurisdiction over the Hospital. *Methodist Hospital of Kentucky*, 227 NLRB 1392 (1979).

Thus, the decision in the representation case not to exercise jurisdiction was based on a change in circumstances since the unfair labor practices were committed. In these respects, *Screw Machine Products Co*., supra, is distinguishable from this case.

The Hospital wants to rely on the city's January 14, 1991 resolution to absolve it of unfair labor practices that had occurred back in 1990, months before the city's resolution. The Board's decision in *Screw Machine Products Co*., supra, does not support the Hospital on this point.

I believe that under the rationale of *Children's Baptist Home*, 215 NLRB 303 (1974), the Board should exercise jurisdiction to remedy the unfair labor practices found to have been committed. It is clear that the employees of the Hospital had every right to believe that the Board had jurisdiction over the Respondent at the time of commission of the unfair labor practices. It had previously exercised jurisdiction in *Methodist Hospital of Kentucky*, supra, the Respondent's answer to the first complaint here admitted jurisdiction, and Respondent's communications to its employees during the organizing campaign, while mentioning Board law often, did not claim that the Board lacked jurisdiction. Charging Party would read *Children's Baptist Home*, supra, as allowing the remedying of 8(a)(1) violations as well as violations of Section 8(a)(3) and (1). As that matter is not entirely clear from a reading of *Children's Baptist Home*, I will leave this legal determination to the Board. It does seem to me imperative that the Board remedy the 8(a)(3) violations under the circumstances. It is rather pointless, however, to remedy the 8(a)(1) violations if the Board is not going to assert its full discretionary jurisdiction.

E. *Consideration of the Jurisdictional Issue is Not Barred by the Prior Representation Case*

Throughout the litigation of these unfair labor practices, Respondent has contended that since the Acting Regional Director ruled in 1991 that the Board does not have jurisdiction over this Respondent, the General Counsel cannot claim that the Board does have jurisdiction. Counsel for General Counsel asserts that notwithstanding the Board's decision in the representation case denying review of the Acting Regional Director's decision, the General Counsel is not barred by Section 102.67(f) of the Board's Rules and Regulations from relitigating the issue of whether the Board should assert its discretionary jurisdiction over Respondent. The General Counsel also asserts that the Board is not estopped from reconsidering its decision in the prior representation case. In my opinion, the Board has already ruled on this defense, in favor of the General Counsel. Its Order of January 4, 1993, denying Respondent's motion for summary judgment necessarily ruled that the matter could be relitigated. Though this Order indicated that there were some factual issues to be decided, those could only affect a determination of whether the Board should exercise its discretionary jurisdiction. Additional fact findings would have no bearing on the matter of relitigation. Even in the event this is not so, however, I find the matter may be relitigated herein, Section 102.67(f) of the Board's Rules and Regulations notwithstanding.

Section 102.67(f) of the Board's Rules in relevant part states, that a denial of a request for review shall preclude the parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. In interpreting this section in *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941), the Supreme Court rejected an employer's claim that the Board had erred in refusing to receive, in the unfair labor practice proceeding, evidence on the subject of the appropriateness of the unit similar to that contained in the record of the representation proceeding. In so doing the Court stated, ''the unit proceeding and this complaint on unfair labor practices are really one.'' Id. at 158. In a subsequent Board case, which allowed the relitigation of the supervisory status of an individual charged with separate 8(a)(1) violations, the Board commented that, ''The Court's 'really one' case comment was made with reference to the unit finding in the representation proceeding and the subsequent refusal to bargain complaint case based on this unit finding.'' *Suburban Homes Corp*., 173 NLRB 497 fn. 1 (1968). See also *Stanley Air Tools*, 171 NLRB 388 (1968); and *JAMCO*), 294 NLRB 896 (1989).

It appears therefore, the term ''related subsequent unfair labor practice,'' as used in Section 102.67(f), normally applies to ''an 8(a)(5) case based on the representation case certification.'' See *Greenbrier Hotel*, 216 NLRB 721, 723 fn. 5 (1975). The Board, however, recently affirmed without comment the conclusion of an Administrative Law Judge that Section 102.67(f) bars relitigation of a jurisdiction question in a proceeding addressing alleged violations of Section 8(a)(3) and (1) of the Act, where there was no test of certification. In *Verland Foundation*, 296 NLRB 442 (1989), the employer tried to relitigate the Board's prior assertion of jurisdiction when the employer operated a health care facility subject to state regulation. The General Counsel argued that Section 102.67(f) prevented the employer from attempting to relitigate the jurisdiction issue. The employer argued that presence of the word ''related'' in the text of Section 102.67(f) meant that the section was therefore applicable only to test of certification cases. The Administrative Law Judge rejected the employer's theory, noting that the text of Section 102.67(f) did not contain such a restriction and that the unfair labor practice case was related to the prior representation case because both were ''premised on the issue'' of the Board's jurisdiction over the employer. Id. at 443.

Even in the face of this case, I believe that Section 102.67(f) is not a total bar to relitigation of jurisdiction questions. In *St. Francis Hospital*, 271 NLRB 948 (1984), involving a 8(a)(5) allegation, the Board revisited and reversed a prior decision in a representation case, noting that:

> this prohibition against relitigation of representation issues in a subsequent technical 8(a)(5) refusal-to-bargain situation applies to the parties—the employer and the union—and does not preclude the Board from reconsidering its own earlier action. [Id. at 949.]

In reliance on *St. Francis Hospital*, because the General Counsel was not a ''party'' in the representation proceeding within the meaning of Section 102.67(f), the General Coun-

sel is not barred from placing the jurisdictional question before the Board in these cases. Nor is the Board precluded from reconsidering its own earlier jurisdiction decision.

Furthermore, the relitigation of the jurisdictional question in these cases is not inconsistent with the purposes served by Section 102.67(f), which include the expeditious holding of representation elections to permit employees to exercise their Section 7 rights and similar expeditious implementation of election decisions. In those situations to allow an employer to relitigate jurisdictional questions in unfair labor practice cases in which unions have been certified and employers refused to bargain serves to deprive employees of the right to collective bargaining that they have achieved through union certification.

The posture of the instant cases, however, is the opposite of the posture of the cases to which Section 102.67(f) is usually applied, for the Regional Director's decision deprived the employees access to the Board and the opportunity to vote in a representation election. Thus, the literal application of Section 102.67(f) to foreclose consideration of the representation argument described below would result in precisely the effect the rule is normally used to prevent—the frustration of employee rights.

F. *Conclusion with Respect to Jurisdiction*

I find the Respondent, Methodist Hospital of Kentucky, Inc., a nonprofit Kentucky corporation, is engaged in the operation of a health care institution in Pikeville, Kentucky, providing in-patient and out-patient medical and professional care services. During the 12 months preceding the issuance of the complaint, in the course and conduct of its business operations, it derived gross revenues in excess of $250,000, and purchased products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Kentucky. Respondent is now, and has been at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. THE INVOLVED LABOR ORGANIZATION

The Union is now, and has been at all times material to this proceeding, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Respondent has engaged in the following acts that are in violation of the Act:

1. Acting though Teresa Newsom, (a) discriminatorily removed union literature from Respondent's bulletin boards; (b) orally promulgated and thereafter maintained a rule prohibiting employees from talking about the Union except while on their breaks while permitting nonunion related discussions; and (c) orally promulgated and thereafter maintained a rule prohibiting employees from going to other floors in its facility to talk about the Union while permitting employees to go to other floors for other nonwork related matters. (CP 5(a)(i,ii,iii).)

2. Acting through Lloyd Price, solicited grievances from an employee in order to discourage employees' union activities. (CP 5 (b).)

3. Advised employees working as shift coordinators that they were supervisory employees without vesting them with any supervisory authority in order to discourage support for the Union among employees. (CP 5(c).)[3]

4. Acting through Lloyd Price, circulated an opinion survey among employees thereby soliciting grievances of employees to discourage union activities. (CP 5(d).)

5. Acting through Cheryl Hickman, (a) coercively interrogated employees about their union activities and threatened employees with unspecified trouble if they signed a union authorization card; (b) coercively interrogated employees about their union activities; and (c) prohibited employees from discussing the Union. (CP 5(e)(i,ii,iii).)

6. Acting through Patty Akers, Judy Steffey and other supervisors, engaged in surveillance of employees' union activities and created an impression among employees that their union activities were under surveillance by Respondent. (CP 5(f).)

7. Acting through Lois Jones, restricted postings on employees bulletin boards and prohibited employee from discussing the Union thereby orally promulgating an overly broad, no-solicitation rule. (CP 5(g).)

8. Acting through Patty Akers, discriminatorily enforced Respondent's access policy to discourage employees' union activities. (CP 5(h).)

9. Acting through Judy Steffey, coercively interrogated an employee concerning the employee's union sympathies, threatened the employee with unspecified reprisals in the event that the employee continued to engage in union activities, and promised the employee possible promotions should the employee choose to refrain from union activities. (CP 5(i).)

10. Acting through its security guards and supervisors Cheryl Hickman and Ron Carter, engaged in surveillance of an employee to discourage employees' union activities. (CP 5(j).)

11. Acting through Dr. John Tummons, solicited employees' complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment to discourage employees' sympathy for and activities on behalf of the Union. (CP 5(k).)

12. Acting through Lloyd Price and John Tummons, solicited grievances from employees and promised to rectify certain problems to discourage employees from engaging in union activities. (CP 5(l).)

13. Acting through Maudie May, Carolyn Jones, Sally Stamper, Debra Battistello, Jean Shakey, Betty Martin, and Nina Reynolds and by paying the cost of mailing, assisted, supported, and approved of the circulation among its employees of a petition to dissuade the Union from seeking to represent Respondent's employees. (CP 5(m).)

14. Acting through Barbara Ratliff, (a) orally promulgated a rule prohibiting employees from talking about the union except when on their breaks while permitting nonunion related discussions during nonbreak times, and (b) orally promulgated a rule prohibiting employees from posting union literature on its bulletin boards while permitting nonunion related postings. (CP 5(n)(i,ii).)

15. Acting through Linda Saylor, orally promulgated a rule prohibiting employees from talking about the Union except

[3] The General Counsel withdrew this allegation at the hearing.

on their breaks while permitting nonunion related discussions during nonbreak time and restricted the distribution of union literature to Respondent's coffeeshop and cafeterias. (CP 5(o).)

16. Acting through Ron White, impliedly threatened an employee who had been distributing union literature by asking her to identify herself and asking the location of her supervisor and created the impression that her union activities were under surveillance by Respondent. (CP 5(p).)

17. Acting through Tommy Williams and another security guard whose name is unknown, orally told employees that they could not distribute literature in its parking lots. (CP 5(q).)

18. Acting through Bob Ratliff, (a) orally promulgated a rule prohibiting employees from talking about the Union while eating lunch in the paint shop and threatened to prohibit employees from eating lunch in its paint shop to discourage employees' union activities, and (b) orally promulgated a rule prohibiting employees from posting union literature on their lockers and on bulletin boards while permitting nonunion materials to be so displayed. (CP 5(r)(i,ii).)

19. Acting through Romona Norris, created the impression that employees were being kept under surveillance because of their union activities. (CP 5(s).)

20. Acting through Phyllis Bowling, impliedly threatened an employee by telling her that from now on she should be nonunion. (CP 5(t).)

21. Acting through Dr. John Tummons, announced that on-call surgery employees would receive a 25-cent-an-hour wage increase in on-call pay to discourage employees union activities. (CP 6(a).)

22. Announced new benefits, including a dental plan, disability insurance, an increased base wage rate and a tax annuity savings plan to discourage employees from engaging in union activities. (CP 6(b).)

23. Respondent constructively discharged its employee Phyllis (Gibson) Campbell. (CP 6(c).)

24. Respondent instituted changes in its job posting, vacation, and sick leave policies to discourage employees' support for the Union. (CP 6(d).)

25. Respondent gave an unsatisfactory evaluation to its employee Judy Webb. (CP 6(e).)

26. Respondent changed its policy regarding employee purchases of products and services to discourage employees' union activities. (CP 6(f).)

27. Respondent changed it birthday holiday policy to discourage employees' union activities. (CP 6(g).)

28. Respondent disciplined and changed the job duties of its employee Rapunzel Hall. (CP 6(h).)

29. Respondent discharged its employee Robin Gray. (CP 6(i).)

With respect to each separate issue framed by the complaint, I have noted the paragraph where the alleged activity is noted in the complaint. The complaint paragraphs are designated CP followed by the number and letter of the complaint paragraph, and the page number of the discussion is designated D, p., followed by the involved page number.

A. *Did Respondent Unlawfully Solicit Grievances from Employees and Promise to Rectify Problems in Order to Discourage Union Support?*

This discussion involves complaint paragraphs 5(b), (d), (k), and (l). Beginning the first week of August, Respondent hired a consulting firm, SESCO, with the first task of the consultant being to take a opinion survey of the Hospital's employees. Respondent contends that this survey could not be motivated by antiunion feelings as its inception predates its knowledge of the union organizing campaign. In this regard, the General Counsel contends that Respondent became aware of the campaign on July 30, when a list of employee organizers was attempted to be given to Dr. Tummons. Amanda Hawkins, an LPN employed by the Respondent testified that she attended a meeting conducted by the Union on Sunday, July 29. This meeting was attended by a number of the hospital employees. She, along with several other employees, signed a list designating the Union's employee organizing committee. The list, marked General Counsel's Exhibit 10 in this record, contains the names of some 26 employees and is dated July 29. Hawkins testified that on Monday, July 30, she and some 15 or 20 other employees, took the list to Dr. Tummons about 8 a.m. He was not in his office so the employees waited for him and when he arrived, in the company of a Dr. Fannin, who worked at the Hospital, Hawkins handed him the list and told him they (the gathered employees) wanted the Union to represent them. According to Hawkins, Tummons looked at the list and handed it back to her, saying he would have to talk with the lawyers. Hawkins also testified that about a week earlier, her supervisor, Shirley Coleman, spoke with some nurses on Hawkins shift, telling them that she had heard that union organizing or activity was going on in the Hospital.

After Tummon's refused to accept General Counsel's Exhibit 10, Hawkins took the list back to union organizer and representative, Ann Kempski, at a local hotel. Kempski said she would fax the list to Tummons.

Lisa Ann Smith, a RN at the Hospital, testified that she signed an authorization card in August 1990, but signed the organizing list on July 29. She attended the July 29 union meeting and Kempski told the employees there that the list would be given to Tummons the next morning. She was not present for the confrontation with Tummons as she did not work the morning shift.

Marley Adkins is employed by Respondent as a maintenance technician. He testified that he attended the meeting on July 29 and signed the list. He further testified that he was with the group of employees who presented the list to Dr. Tummons on the next morning.

Linda Gunnells, an employee of the hospital in July 1990, signed an authorization card on July 22. Her name appears on General Counsel's Exhibit 10.

Jeffrey Williamson was a staff RN at the Hospital in 1990, but had been promoted to a supervisory position by the date of hearing. He signed a union authorization card dated July 30. His name appears on General Counsel's Exhibit 10. He contends that he signed General Counsel's Exhibit 10 after he signed the authorization card, and he further contends that the list was presented to Tummons some weeks after July 30.

In all other respects, however, his testimony corroborates the testimony of the other employees about the meeting with Tummons. He also testified that the Union faxed either a copy of General Counsel's Exhibit 10 or a later version of it to Tummons. Williamson admitted that he had a clear memory of events in 1990, but not specific dates.

Respondent introduced as Respondent's Exhibit 52 a copy of what purports to be General Counsel's Exhibit 10, but with a fax notation across the top indicating the fax date to be August 12, a Sunday.

There is a question raised by the evidence about when Respondent became aware of the organizing effort of the Union. I believe that the best evidence would indicate that it was at the end of July rather than the middle of August. First, four of the five nurses testifying about the date of delivery of the list of employee organizers put it at July 30, and the one who put it later was admittedly fuzzy about dates. The nurses testifying as to the July 30 date were also apparently credible witnesses. Moreover, Hawkins credibly testified that her supervisor indicated knowledge of the Union effort even before the list was presented to Tummons. Interestingly, as noted earlier, Mayor May testified that he reported to Tummons the existence of the union organizers sometime in the summer of 1990, putting the time somewhere in August or September. He did not indicate, however, that Tummons was aware of the effort at the time he informed him of the presence of organizers, so it had to be at a date preceding the delivery of the list of organizers.

It was shown that the last employee opinion survey commissioned by Respondent was taken in 1982. Because of the timing of the bringing in of the consultants, and the fact that such surveys were rare in the Hospital's experience, I find that the survey was in response to the organizing campaign. Personnel Director Juanita Deskins testified that SESCO was used during the campaign to oppose it, though she did not indicate knowledge that SESCO was initially hired for that reason. SESCO sent several employees to the Hospital, beginning August 5. These employees conducted an indepth survey of employee attitudes on virtually every aspect of their employment. Employees were interviewed on a one-on-one basis. Nurse Hawkins asked Lloyd Price, the SESCO official who was giving her the survey, why the employees were filing out the survey. He responded that it was to see what the problems were so they might work on them. She asked if there had not been a previous survey, and he answered that there had been one about 8 years before. He commented that nothing had ever come from that survey, but that Dr. Tummons was going to do something about the survey the employees were now taking. Price told nurses' aide Barbara Coleman that the survey was confidential and that its purpose was to better the working conditions and to find out what the problems were.

SESCO provided Respondent with the results of the survey on August 16. The cover letter, in part, indicates that the ''Open Comments'' section of the report ''provides much valuable information by providing a candid insight of the causes of possible dissatisfaction, complaints, and poor morale.'' It also indicates that the survey should provide ''a 'springboard for action' that will lead to the improvement in employee attitudes, working relationships, morale, and an overall assessment/refinement to the worklife environment of your organization. Through our follow-up recommendations which will follow, and your communications with your employees, many problem areas revealed in the survey can be pinpointed and corrected in very short order. We will look forward to helping you to identify these points of vulnerability and suggesting suitable solutions in our follow-up conferences.''

As I have found that the survey was commissioned and taken after Respondent learned of the organizing campaign, that Respondent did not have a regular practice of taking such surveys, and as one of its agents, Lloyd Price,[4] informed employees that the purpose of the survey was to find areas of employee discontent and solve the problem, I find that it violates Section 8(a)(1) of the Act. *Weather Shield of Connecticut*, 300 NLRB 93 (1990); *Columbus Mills*, 303 NLRB 223 (1991); *Matheson Fast Freight*, 297 NLRB 63 (1989); *House of Raeford Farms*, 308 NLRB 568 (1992). I can find no compelling evidence that Tummons violated the Act independently by soliciting grievances and promising to remedy them as alleged in the complaint. There is evidence that prior to the organizing campaign, he had held meetings with employees and invited them to bring their problems and concerns to them. This, of course, is not unlawful.

B. *Did Respondent Unlawfully Change Wages, Benefits, and Working Conditions of Its Employees in Response to the Union Organizing Campaign?*

This discussion will involve complaint paragraphs 6(a), (b), (d), (f), and (g). After the results of the survey were presented to Tummons, he conveyed the results to assistant administrators of the Hospital, noting that the survey uncovered a degree of unhappiness on the part of the employees. The assistant administrators were to study the portion of the survey relating to their departments to see how their departments fared. Thereafter, SESCO personnel met with management explaining the do's and don'ts for management during the union campaign, advising them what they could say to employees about the Union. SESCO personnel were at the hospital for several months during the campaign. They assisted Tummons in preparing and issuing a number of letters or memos to employees opposing the union organizing effort. Typical of such memos is the following that was issued to employees by Tummons:

> As Anne Kempski and her Steelworkers Union supporters intensify their efforts to get you to sign one of their membership cards and turn you into dues payers, rumors, distortions and out and out misrepresentations

[4] Price is alleged to be a statutory agent of Respondent as certain security guards employed by the Hospital. Respondent has denied this status. The Board has held labor relationsconsultants to be agents of an employer when those consultants engage in unfair labor practices on behalf ofan employer. In the instant case, it is uncontroverted thatRespondent hired SESCO to conduct its employee opinion survey, and that SESCO advised Respondent on its campaignto defeat the Union. Under such circumstances, Price, anemployee from SESCO, is clearly an agent of Respondent. *Gourmet Foods*, 270 NLRB 578 (1984); *M. K. Morse Co.*, 302 NLRB 924 (1991); *Blankenship & Associates*, 306 NLRB 994 (1992). Likewise, the Board has held that when securityguards are employed by a respondent and in the course of their duties violate the Act, those guards are agents of the employer. *Southern Maryland Hospital Corp.*, 293 NLRB 1209 (1989).

are flying fast and furious. Here are just a few of the misrepresentations I have heard recently.

Misrepresentation #1

The Union will pay everybody's bills while they are on strike even if you don't pay union dues.

My comment

I would be more than a little suspicious of this or any other union promise unless it was put in writing and guaranteed by a responsible Steelworker Union official.

Misrepresentation #2

There will be a no strike clause in the union contracts so nobody will ever have to go out on strike.

My comment

This is a particularly interesting comment coming from the same union that also promises to pay all of your bills while you are on strike. When people don't tell the truth, it gets harder and harder to keep what they say straight and consistent. But beyond the obvious inconsistency here, no strike clauses can be negotiated into a contract, but they are only valid during the life of the contract. The problem is that the vast majority of strikes take place when contract negotiations have broken down or for recognition, not during the life of a contract and a no strike clause would be of no value in those circumstances.

Misrepresentation #3

The Steelworkers will ''give'' you the same insurance the miners have.

My comment

First of all, the steelworkers don't and can't ''give'' you anything. The Steelworkers do not provide paychecks or benefits or anything else. The hospital does. All the Steelworkers can do is ask. The hospital has always provided quality insurance coverage and there is not reason to believe that our insurance will not be improved in the future just as it has in the past, without the Steelworkers Union. This union promise is as worthless as any union promise that is not put in writing and guaranteed by a responsible union official.

Misrepresentation #4

The October wage and benefit package is out the window. You have to sign a membership card and vote for the union in order to get anything.

My comment

This is simply not true and I am amazed that anyone would make such a statement. The Board will proceed to act on the proposed budget which includes pay and benefit recommendations.

Misrepresentation #5

You should sign a membership card and not discuss the signing of this card or any problems you may have with anyone other than the Steelworkers union and its supporters.

My comment

A person would have to be an excellent salesman to get me to sign a legally binding contract without shopping around and discussing it with someone knowledgeable on both sides of such an important issue. Also, when you sign a legally binding contract, they don't even give you a copy. The union is anxious to get your signature on legally binding documents, but they sign nothing and risk nothing. You Do!

Misrepresentation #6

The NLRB's regulations on ''appropriate health care industry bargaining units'' will not apply here. We will have one big union here for everybody.

My comment

Ms. Kempski is trying her best to confuse this issue. The only thing I have seen her offer as ''evidence'' of her position is a photocopy of a newsletter page from the Bureau of National Affairs (BNA) which is not a government agency, but a private for profit company that has absolutely no authority to speak for the NLRB or the courts.

Even Ms. Kempski's own ''evidence'' is far from conclusive. In the second paragraph it says that the NLRB's 8 bargaining unit rule will not be implemented until October (38 days from now). Ms. Kempski also conveniently overlooks the fact that it is the unions, including her own Steelworker's union that are fighting for implementation of the NLRB's 8 bargaining unit rule. In other words, by arguing for ''one big Union,'' Ms. Kempski is arguing against the position of her own union.

Another interesting fact that Ms. Kempski ignores is the fact that RN's and other professionals have never been allowed to be in any bargaining unit that includes non-professionals unless they (the RN's and/or other professions) first have the opportunity to vote in a secret ballot election whether or not to be included in a non-professional unit. The current NLRB regulations just reinforce this pre-existing, long standing NLRB rule.

What I know to be true about appropriate bargaining units in health care is that in April 1989, the NLRB published its current 8 bargaining unit rules. The American Hospital Association appealed the NLRB 8 unit rules and in April 1990, the Seventh Circuit Court of Appeals denied the appeal. The AHA has appealed this ruling to the U.S. Supreme Court but it is not known whether or not the Supreme Court will even hear the appeal, let alone overturn it. Labor unions (including the Steelworkers) will be supporting the 8 bargaining unit NLRB rules as they did before the Seventh Circuit Court of Appeals, not the one big unit that Anne Kempski is promising.

Misrepresentation #7

If you feel you were lied to otherwise misrepresented when you signed a Steelworker Union Membership Card, Ms. Kempski will be glad to return it to you.

My comment

I have been told that the first few people who got the real facts asked for their cards back were given them, but as soon as Ms. Kempski saw that the number

> of people asking for their cards back was growing, she changed her story. It appears that Ms. Kempski is no longer returning cards upon request. The Steelworkers are starting to play hardball. No more Mr. Nice Guy!
>
> I will continue to give you as many facts as I can. I hope you will look carefully at both sides of this most important issue.

After the survey was taken, in addition to writing such letters to its employees, Respondent announced certain changes in wages and other benefits in August and implemented them in October. In October, the Hospital put in a different wage system and different fringe benefit plans. With respect to wages, it went from a grade and step structure to a base rate system. It added a dental plan to the benefits package, with the Hospital paying a part of the premium for hourly employees. It also instituted a long-term disability plan, again with a portion of the premium being paid by the Hospital for hourly employees. Additionally, it instituted a tax shelter annuity plan, as a supplement to the Hospital's pension plan.

Deskins testified that plans had been in the works for some time to institute these changes and that Tummons had given his approval to the changes around July 30 or the first of August. Employees were notified of the changes at a meeting held by Tummons in late August. Prior to this time, employees were notified of wage increases by their department heads and/or by memo. Hospital employees had historically been given cost of living wage increases, usually in October.

The evidence indicates that on September 18, Respondent initiated a new policy whereby all employees would be notified of job vacancies. Respondent announced a policy to post all vacancies on the employee bulletin boards and in the personnel department. Alpha Carroll, who had first started working for Respondent in 1971, testified that from the time she started until the union campaign, the only place she ever saw job postings was in the personnel office. Rapunzel Hall testified that, ''The whole time I worked there, I never saw a (job posting) until 1990, after the union came in.'' After the union campaign began, Hall recalled that a hospital courier would bring around the job vacancy notices. Barbara Coleman had reason to be on the lookout for such postings because she was seeking transfer to another shift, but she never did see notices for job vacancies.

On October 7, 1990, Respondent also changed its policy on holiday bonus payments. This new policy gave the employees who worked the six national holidays a 50-percent bonus of their base wage rates. Another change in the employees' working conditions was Respondent's decision to alter the method of payment of goods and services purchased from Respondent by the employees. For years prior to the organizing campaign, Respondent had permitted its employees to purchase small items such as prescription drugs, uniforms. In those years, the normal method for the payment of such purchases was the execution of an authorization to take the cost of the good out of the employee's paycheck. But, in October 1990, Respondent changed this policy so as to require that the employees would have to pay for the goods that cost $15 and under, and anything over $15 could still be deducted from the employees paycheck. It should be noted at this point, when considering all the changes the Respondent's administrator made, after the start of the union campaign, that none of these changes were sent to the city government for its review and/or approval. Deskins testified that all these changes were made solely by the administrator. Moreover, none of the many antiunion memos distributed to the employees during the period the Respondent allegedly committed the unfair labor practices here under discussion noted the Hospital's position that it was not subject to the Board's jurisdiction.

Respondent contends that the changes in working conditions first announced to employees in August 1990 could not be unlawful because they had been planned or decided on before the Hospital gained knowledge of the organizing campaign. In this regard it offered evidence that in April 1990, Tummons directed Deskins to revise the salary scale at the Hospital to a new base rate system of compensation. According to Deskins, Tummons outlined by hand the compensation system he wished to have in place for the succeeding fiscal year. Prior to that, Deskins had completed a phone survey of wage rates elsewhere. Deskins worked on the base rate project for several weeks, concluding her efforts in June 1990, before she went on vacation July 9. Deskins at another point in her testimony indicated that Tummons approved the new wage system around the first of August.

Respondent also points out that though the new pay rates for RN's amounts to about a 10-percent increase (to solve recruitment problems), increases for other employees is relatively marginal. The change in the on-call pay alleged to be unlawful occurred on July 10, a date in advance of Respondent's knowledge of union activity, and cannot be said to be an action taken in response to that activity.

With respect to the other changes in benefits, Respondent introduced evidence that quotes for a dental plan, disability insurance, and a tax annuity savings plan had been solicited from vendors and received in June and July 1990. Deskins testified that the decision to implement such benefits occurred in June, though there is no written document to support this. The correspondence from vendors does not make it clear that a vendor for the benefits programs had been firmly selected by mid-July. Respondent's Exhibit 29, dated in April, indicates that Tummons directed his then-personnel director to pursue additional employee benefits, including those granted in October, and to change the pay scale. The memo certainly supports Deskins' contentions that change in pay system and benefits were initiated and planned well before the union campaign began. As such plans were made before any knowledge of the campaign, and as they appear from the testimony and documentation to be decided on before that date, I find that their announcement and implementation after Respondent gained knowledge of the campaign does not violate the Act. *Weather Shield of Connecticut*, 300 NLRB 93 (1990); *American Sunroof Corp*., 248 NLRB 748 (1980). It may be contended that the method of announcing the changes, that is, in employee meetings, rather than by memorandum as was the past practice, might violate the Act. The evidence reflects that Tummons, however, since his coming to the Hospital had held employee meetings to make announcements and thus, the practice of holding employee meeting for announcements predated Respondent's knowledge of union organizing activity.

I likewise agree with Respondent that the other changes in working conditions and benefits alleged in the complaint to have been unlawfully made are not unlawful under all the

circumstances. The record in this case establishes that the Hospital has always had a written job-posting policy, the details of which have been amended periodically to accommodate changes in the spatial layout of its operations. Thus, the Hospital's revised policy on transfers, dated October 12, 1977, provided that, ''The Personnel Department will post notices of vacant positions for dissemination to employees.'' At the time this policy was in effect, the Hospital's personnel office was located within the hospital facility itself. It was in early 1990, prior to organizing activity, that the Personnel Department moved to an offsite location on Chloe Road.

On June 27, 1990, the transfer policy, now termed ''Change of Classification,'' was amended to state that ''Vacant positions for which employees will be considered will be posted on the employee bulletin board beside the Cafeteria and in the Personnel Office,'' ''for a minimum of three (3) days unless determined otherwise by the Personnel Office.'' There has been no tangible change in the Hospital's posting procedure. Superficial adjustment of the standard time for a posting, ''unless determined otherwise,'' and identification of an additional location for posting placement necessitated by relocation of the personnel office, hardly affect terms and conditions of employment to any degree whatsoever, much less to a level that could be characterized as interference, restraint, or coercion of employees in the exercise of Section 7 rights.

Although certain witnesses called by the General Counsel claimed to have never seen a job posted at the Hospital ''prior to the organizing campaign,'' at least one of his witnesses testified that she saw job postings on the personnel office bulletin board prior to its relocation, a fact confirmed by the introduction in evidence of several postings in evidence for the year 1989. These postings confirm that the 3-day durational requirement for postings, ''unless determined otherwise'' is consistent with the Hospital's prior treatment of this issue. Thus, an August 29, 1989 posting required action no later than September 1, 3 days hence. A July 11, 1989 posting for emergency room supervisor required action within 7 days. A May 1, 1989 posting for histology technician had a cut-off date of May 5, and a 2-week posting was specified in a February 24, 1989 posting for a vacant diet technician job.

As for the Hospital's vacation policy, there was a change that occurred during the organizing campaign. The change was minimal and for reasons that appear to me to be legitimate. The precise change is identified by comparison of subpart D of the June 27, 1990, and September 18, 1990 vacation policy revisions. That change is that while previously ''No less than one day vacation may be taken at any time,'' following September 18 the minimum was ''No less than four (4) continuous vacation hours.'' Rates of accrual and amounts of vacation entitlement were unchanged by the September 18 policy. Deskins testified about the Hospital's reason for this change in minimal authorized utilization. According to Deskins: ''Where we had offered more flexible shifts, during that time . . . to enhance our recruiting ability—we had also discovered earlier in the year, that when employees were working twelve hour shifts, they were being paid twelve hours shifts, on holiday times. And, that is something—Dr. Tummons said, 'No, that is not how it should be' —that a holiday is given in eight hour increments. So, that was stopped earlier in the year, and then, this was put in place so that employees could take four hours of vacation, if they chose to—to make up the difference in the different hours, in the flexibility of shifts.''

Here, as a recruitment too, the Hospital had previously offered flexible schedules involving 12-hour shifts, the economic consequences of which to incumbents, for holidays and vacation days, was to lose 4 hours' earnings under the 8-hour pay limitations contained in the existing policies. To be able to avoid a reduction in pay for these individuals, the Hospital authorized, on September 18, a 4-hour incremental use of accrued vacation, to fully compensate an employee for a 12-hour day not worked, but compensable as a holiday or a vacation day.

There is no evidence that the change was in response to any preelection issue advanced by the Union, nor were the parties within the sensitive preelection period when in changes in employment terms are viewed more critically. The September 18 relaxation of minimal vacation utilization, without modification of accrual rates or amounts, occurred 6 weeks before the Union filed a petition in the underlying cases. I can find no causal connection between the union campaign and the vacation policy change.

There is an allegation in the complaint about a sick leave policy change in mid September 1990. No evidence was offered in support of this allegation and it will be dismissed. With respect to the payroll deduction practice, Thelma Vinson, the management official in charge of the Hospital's payroll operation, testified about the change. Prior to the fall of 1990, employees were permitted to ''[c]ome in to the pharmacy, materials and management, or any place that they could get a service, or something that they needed—sign a payroll deduction, state how much they wanted to have taken out each pay (period), and, then, that little slip of paper would come over to payroll, and, they would manually input those deductions, ever how small they (employees) wanted them to be—to come out of their pay.''

> [P]harmacy . . . medications are expensive. and, they would be more than what their paycheck is . . . and they were stretched out over—you know—five, six seven eight, nine, ten—whatever they wanted—and, try to get it down to like five dollars, six dollars, seven dollars. They would take small purchases and try to stretch it out, too, and, just have fifty cents taken out of pay, or a dollar, or something. You would go both directions. You would go from extremes, to small things, which is still time consuming, because everything had to be manually imputed.

The payroll deduction purchase practice had not, until 1990, ever been reduced to writing and was not uniform. Different departments within which purchases were made did different things. In response to the burden of processing these items, and in conjunction with the implementation of a new automated system for payroll, a decision was made to standardize the employee payroll deduction purchase practice. Thus, in October 1990, a general policy with respect to employee purchases through payroll deduction was instituted whereby a floor of 15 percent of the indebtedness, or $15, whichever was higher was deducted each pay period.

There is no causal connection between employee organizing activity and the change that is the subject of this allega-

tion. To the contrary, the Hospital's business interest in standardizing its unwritten payroll deduction practices to reduce clerical time expended performing these tasks, all in conjunction with the introduction of a new automated payroll system, seem to me to establish that the campaign was of no consequence to the action taken. Moreover, this change in practice would likely be viewed as an adverse change by employee and not one which would reduce their union support.

For the reasons set forth above, I find that Respondent did not violate the Act as alleged in complaint paragraphs 6(a), (b), (d), (f), and (g).

C. *Did Respondent Unlawfully Discriminate in the Enforcement of its Posting and Distribution Rules?*

This section discusses complaint paragraphs 5(a)(i), (g), (n)(ii), (o), (q), and (r)(ii). On June 27, 1990, before the advent of organizing activity, Respondent amended its existing solicitation policy to specifically provide:

> Any written material to be displayed in the Hospital must be approved by the Personnel Director or Administrator. Unless specific permission is obtained, such display is in violation of Hospital policy.

Prior to June 1990, the Hospital maintained a no-solicitation policy which, but for the above-quoted passage, was virtually identical to the most recent republication. The General Counsel does not contend that the rule as promulgated is unlawful; rather, that discriminatory enforcement of the policy by the Respondent violated the Act.

A number of employee witnesses testified that Respondent allowed the posting of personal, charitable, and otherwise nonwork related material on the Hospital's bulletin boards after the promulgation of the revised no-solicitation rule while enforcing the policy with respect to the posting of Union related material. The Hospital maintains a number of bulletin boards, including one in personnel, one beside the cafeteria, and one in each patient care area. Employee Alpha Carroll testified that prior to the union campaign, employees on her floor posted on that floor's bulletin board wedding announcements, revival announcements, postcards, and jokes. She further testified that on August 1, a list of the employee union organizers was posted. Carroll's supervisor, Teresa Newsom, observed the list and removed it. On cross-examination, it was pointed out that Hospital's records revealed that Carroll was not working on August 1. Carroll stated that she may have been wrong about the date, but not the incident. Newsom admitted that on or about August 20, she removed a union organizing committee list, simultaneously removing a church revival notice. Newsom further testified that although she removed the postings, she did so because they violated hospital policy and that she routinely does so when she discovers nonhospital business materials, which she has observed in the form of wedding announcements and baby showers in the past.

Employee Amanda Hawkins testified that on her floor, at the outset of the union campaign, there were posted on the bulletin board wedding invitations, shower invitations, postcards from vacationing employees, and newspaper wedding announcements. She further testified that prior to the campaign, employees were not required to get permission to post such nonwork related items nor were they told not to post them. On about September 18 or 19, Hawkins' supervisor, Shirley Coleman, told a group of nurses in their lounge that there was to be no more announcements posted on the bulletin board. Though Hawkins was aware of the Hospital's longstanding written policy about postings, she testified credibly that they were not enforced until Coleman's announcement in September.

Employee Barbara Coleman testified that she had observed nonwork related material posted on the Hospital's bulletin boards by employees since she started working at the Hospital in 1989. To the best of her knowledge there had never been a requirement to get permission to post such materials. Similar testimony was given by employees Rapunzel Hall, Ruth Thacker, Bruce White, Linda Gunnels, and Jeffrey Williamson. Employee Lisa Smith testified that she had put up union literature on the nurses lounge bulletin board. On August 19, Supervisor Lois Jones came to the sixth floor and held a meeting with the employees near the nurses station. Smith recalled that Jones announced to the employees they could no longer post anything on the bulletin board, and mentioned union literature specifically. Barbara Colemen was given a similar message by Smith. Linda Gunnels testified that Jones gave her the same prohibition about the use of the bulletin boards. Ruth Thacker, an employee in the medical records department, testified that she asked her supervisor, Barbara Ratliff, in the latter part of October if she could post union literature and was told no by Ratliff.[5]

Respondent's employee Marlie Adkins was employed as a maintenance helper in 1990, and his supervisor was Bob Ratliff. He testified that on October 16, he was eating lunch in the Hospital's paint shop with four other employees when Ratliff and two other supervisory employees came in the shop. According to Adkins, Ratliff proceeded to take down literature that was posted on a cabinet in the shop, stating that the cabinet was not a bulletin board. He then told the employees eating lunch that he knew that they were talking about the Union and if it did not stop, he would padlock the shop and they could not eat lunch there anymore. The material Ratliff removed from the cabinet included both pro- and antiunion literature, work schedules, and comics. He then told Adkins that Adkins had lied to him about taking Adkins name off the list of employee union organizers. Adkins said he had not lied, and that if he had known it was going to make Ratliff so mad, he would have not signed the list in the first place. Ratliff then showed him a list of the organizers, with Adkins name underlined. He then told Bruce White, who was another of the employees eating lunch, that it was his job to keep the union literature off the cabinet.

Bruce White testified that he had posted both union and hospital literature on the cabinet, as well as nonwork related material such as basketball schedules and jokes. White corroborated Adkins testimony about Ratliff removing material from the cabinet and added that Ratliff stated, ''. . . the

[5] Pars. 5(s) of the complaint alleges that on October 26, Supervisor Ramona Norris created the impression that employees were being kept under surveillance. The only testimony supporting this allegation that I can find in the record is Thacker's testimony that after Ratliff told her that she could not post union literature on the bulletin board, she observed Norris check the bulletin board three times the same day. Assuming this is the evidentiary support for the involved allegation, it is not sufficient to prove a violation of the Act. I will recommend dismissal of this complaint allegation.

Hospital is not paying you guys wages to have union meetings. And I don't want any more literature like that on the locker, which is not a bulletin board.'' White, as a painter, had occasion to go through the Hospital and testified that prior to the union campaign, he observed nonwork related materials on the Hospital's bulletin boards. He also observed such materials after the campaign began.

Ratliff admitted removing the material from the cabinet, but said he did it regularly when it became cluttered. He denied making any statements about the Union, or even carrying with him the employee organizing list. Respondent also attempted to make any reference to stopping the use of the paint shop for lunch related to Ratliff's dissatisfaction with the mess the employees made. I credit, however, the testimony of Adkins and White. They appeared far more credible than Ratliff. Therefore, with respect to this incident, I find that he did threaten the employees with not allowing them to use the room for lunch if they continued to talk about the Union. Both White and Adkins testified that Ratliff was angry in his confrontation with them. In the circumstances, I find that his actions violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(r)(i).

I believe the evidence supports the General Counsel's position with respect to the matter discriminatory enforcement of the posting rules. It appears and I find that notwithstanding the newly promulgated no-solicitation policy, Respondent allowed the posting by employees of nonwork related materials on its bulletin boards after the June policy revision. Only after the onset of the organizing campaign did it begin enforcing the policy, obviously in an attempt to limit the posting of union literature. There is also credible evidence that posting of nonwork related material was allowed after the campaign started, but not the posting of union literature. For example, see the testimony of Bruce White. Such action is discriminatory and violates Section 8(a)(1) of the Act. *Honeywell, Inc*., 262 NLRB 1402 (1982).

This section discusses complaint paragraphs 5(a)(i), (g), (n)(ii), (q), and (r)(i) and (ii).

D. *Did Respondent Discriminatorily Give Judy Webb a Poor Performance Evaluation Because of Her Union Support?*

This section discusses complaint paragraph 6(e). Judy Webb had attended Respondent's medical technology school and on August 6, she became a full-time medical technologist. While she was attending school, Webb worked in Respondent's medical laboratory as a lab assistant. Her supervisor in the lab was Don Williamson, the chief medical technologist. Webb testified that in the latter part of July, she went to Williamson's office with a question. While in his office, Williamson asked her, ''How do you feel about the unions?'' Webb replied that she had been a part-time employee at a firm whose employees were represented by the Teamsters union, that her father and grandfather had been members of the U.M.W.A., that a brother was currently a U.M.W.A. member, and ''We were just raised a union family, and yes, I was in support of any union.''[6]

In August, Webb signed a union authorization card. Webb testified that she wore a ''vote yes'' union button inside the lab on one occasion, the day before she received her performance evaluation on September 9. Mary Jo Blackburn, assistant lab chief (who reports directly to Williamson) ordered Webb to remove the union button that she was wearing in the lab. Blackburn's handwritten memorandum that describes this incident in detail was contained in Webb's personnel file. Blackburn's memorandum, which is dated September 10, discloses that this incident occurred on September 8. Blackburn wrote that Dr. Tummons wanted her to report to the lab to instruct Webb to remove the prounion button from her lab coat. Blackburn's memorandum describes that she went to the lab and told Webb that she was not allowed to wear any pins other than registry or school pens. Blackburn reported this to Dr. Tummons and also Juanita Deskins.

On September 9, Deskins and Williamson presented Webb with her evaluation. At the time, Webb was the only lab employee who had worn any prounion buttons, and hers was the only lab employee's name that appeared on the list of employee union organizers. Webb's evaluation on September 9 was at or near the bottom of the ratings in all categories. The standard evaluation form rates the employee in seven categories and each of the categories has a numerical 1 through 20 rating, with l being the lowest rating. Ratings of 1 through 3 are ranked as unsatisfactory, a rating of 4 through 7 is below average. Webb received a l in three categories, a 2 in one category, a 3 in one category, and a 4 in three other categories, which placed her in the lowest, below average classification. Deskins put Webb on a 2-month ''extended trial period'' with a notation that she would be reevaluated in 30 days.

In Webb's two previous evaluations, prepared by Williamson on May 31 and June 27, he rated Webb ''average'' in all seven categories. Webb's next evaluation after the one on September 9, which was prepared by Williamson on November 7, rated Webb in the ''average'' ranking in all seven categories. She has received only positive evaluations since that time. Respondent's records demonstrate that Williamson's evaluation of Webb on September 9 is the worst evaluation he prepared for any lab employee for the 2-year period from January 1989 through December 1990. Out of the 63 evaluations of current employees prepared by Williamson in that 2-year period, none of them come close to Webb's negative September 9 evaluation. An examination of those evaluations reveals that only one of these employees (Tracey Smiley) ranked either ''below average'' or ''unsatisfactory'' in any of the seven categories and she scored a ''below average'' in just one category. Out of the 32 evaluations prepared by Williamson of terminated employees during the same period of time, none of those lab employees received an ''unsatisfactory'' ranking in any of the seven categories, and only four employees received any ''below average'' rankings, with one of them (Lon Gibson) receiving four such rankings, and three employees (Shirley Compton, Lloyd Justice, and Cristine Taylor) getting just one such ranking a piece.

Williamson's handwritten comments on the back of Webb's September 9 evaluation is a vague reference to Webb's recent activities 1 day earlier. In his comments Williamson admonishes Webb to ''stop creating antagonism in the laboratory and with any other hospital personnel.'' Webb testified that Williamson explained that she had been antagonistic toward fellow employee Angel Little. Webb remembered calling Little at her home and talking in favor of

[6] The complaint does not allege this conversation violated the Act.

the Union. Williamson also wrote that Webb ''has been very critical of these policies,'' referring to hospital and laboratory policies and that she should ''be a team player.'' In addition, Webb remembers that Williamson explained to her three ''poor'' job performances by Webb. Neither Williamson nor any other supervisors had ever voiced any criticism to Webb about any of these incidents until the September 9 evaluation meeting.

Williamson did not testify in this proceeding. Respondent's primary defense against the allegation of discrimination against Webb in the evaluation given her on September 9 is that the evaluation was prepared on September 7, the day before she wore her union button. Not only can I not be certain that that was the date the evaluation was prepared as Williamson did not testify, but it is clear from Webb's uncontradicted testimony that Williamson was aware of Webb's union sympathies far before she wore the button. Based on Williamson's knowledge of her union support, the lack of criticism of her work at the time her alleged poor performance occurred, the drastically worse evaluation given her after her union support became known as compared with earlier evaluations, and the seriousness with which Respondent treated the wearing of the union button, I find that Respondent gave Webb the poor evaluation in order to discriminate against her for her union support, in violation Section 8(a)(1) and (3).

E. *Did Respondent Unlawfully Interrogate, Threaten, Suspend and Discharge Robin Gray Because of Her Union Support?*

This section discusses the allegations contained in complaint paragraph 6(i). It also discusses complaint paragraphs 5(a)(i), (ii), and (iii), and 5(t), as the allegations in those paragraphs relate to Robin Gray. Robin Gray was employed as a ward clerk in the neo-natal intensive care unit from when she was hired in October 1989 until her suspension on November 8 and discharge on November 14. On August 4, Gray signed a union authorization card.

Her immediate supervisors were Brenda Chapman and Phyllis Bowling. They in turn reported to Cheryl Hickman. About a week after she signed the authorization card, she had a conversation with Hickman in the presence of other employees in the unit. Hickman asked if any of the employees had signed authorization cards and two other employees said they had not. Gray volunteered that she had signed a card. Another employee also acknowledged that she had signed a card, but wanted it back. Hickman advised this employee to send a certified letter to Union Organizer Kempski.[7] Hickman told the employees that the Union was trouble and only wanted in the Hospital to collect the dues the employees would pay. She also indicated that if employees signed cards, it was trouble.

The next day, Hickman asked Gray if she had gotten her card back and Gray said no. Gray indicated Hickman asked her this question a number of times over the next 2 days.

About the end of August, Hickman had a meeting in the unit with Phyllis Bowling, Kay Thornberry, and Gray. She told them not to discuss anything concerning the Union anymore because it was disruptive with the other employees. After the meeting, she called Gray aside and told her specifically not to discuss the Union with coworkers as it was disruptive. Gray asked if this admonition was related to an argument she had with coworker Nicki White. A day or so earlier, she had had a conversation with White wherein White had expressed her antiunion feelings and Gray her prounion sentiments. Hickman again told her not to discuss the Union. As alleged in the complaint, I find the repeated questioning of Gray about her union authorization card, coupled with the admonition that signing such a card could be trouble is clearly coercive and has the clear intent of restraining employees in the exercise of Section 7 rights. Accordingly, I find that Hickman's interrogation of Gray and her fellow employees to be in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs (5)(e)(i), (ii), and (iii). As I note below in connection with the entire matter of Gray's discharge, I credit her testimony over that of witnesses presented by Respondent, and do not credit more innocuous versions of Gray's interrogation or Hickman's other antiunion statements found in this record. Gray was a very credible witness and her testimony is fully supported by the actions taken by Respondent against her. I also find that Hickman's prohibition against Gray discussing the Union to be violative of the Act, when no other topics of discussion among employees were restricted. The prohibition is even more coercive when one considers the fact that Gray's ''disruptive'' union support surfaces shortly thereafter as a negative factor in her annual evaluation.

On October 26, Gray was given an evaluation that reflects satisfactory performance. It comments, however, that ''improvement must be shown with her interpersonal relationships with co-workers, especially due to NICU being a small unit where everyone has to work so closely.'' This was signed by Hickman. Gray commented on the form, ''I feel that all the blame was not shared equally. I also feel that I did get along well with my co-workers.'' The evaluation was given to Gray by Bowling. After showing her the evaluation, Bowling took it to Hickman. Later Bowling returned to Gray with the evaluation, stating that Hickman had said the evaluation could not go through with Gray's opinion on it. Bowling added that ''as a friend from now on I had better be antiunion because my job could be replaced by someone from the street.''[8]

Gray's last day of employment at the Hospital was November 8. On the day before, she had lunch in the Hospital cafeteria with Brenda Chapman. Her lunchbreak was for 30 minutes, which is unpaid. She testified that she went to lunch on November 7 about 12:55 p.m., and spent about 15 minutes in the cafeteria. She had called a local store earlier in the day to ascertain if some photos of hers' that they were processing were ready, and had been advised that they were in. When she left the cafeteria, she returned to her unit and asked Mitzi Thacker, a part-time RN in the unit if it would be okay to go to the store and get the photos. Thacker said

[7] Coworker Mitzi Thacker remembers Gray saying that she wanted her card back. This does not square with Gray's uncontradicted testimony of Bowling's subsequent threat that continued union support could lead to trouble.

[8] I find this uncontradicted threat by Bowling to be coercive in the extreme as it threatens, prophetically, Gray's continued employment. Accordingly, I find that Respondent has violated Sec. 8(a)(1) and (3) by Bowling's threat as alleged in complaint par. 5(t). *Pony Express Courier Corp.*, 283 NLRB 868 (1987); *Quemetco Inc.*, 223 NLRB 470 (1976).

it would be okay. She also mentioned that she was going to the store to shift coordinator, Brenda Chapman, who had no objection. According to Gray, Chapman said nothing about clocking out. According to Chapman, she said that Gray could go, ''as long as she clocked out and back in.''[9] Gray placed the time at this point at about 1:15 p.m. She then left the Hospital without clocking out, went to the store, got her pictures, and returned to the Hospital. She did not clock in on her return. Her estimate of the time she was gone was approximately 25 minutes. Chapman estimated that it was about 45 minutes.

Upon her return to her unit, Gray was informed by Thacker that Gray was wanted to work the desk on the fifth floor. Brenda Chapman was also present and gave her a friendly goodbye as Gray left the unit. She went to the fifth floor and worked there the rest of the day. No one said anything to her about her trip to the store or her failure to clock out and back in that day. Thacker testified that while Gray was gone to the store, she became curious about how long she had been gone as the fifth floor had made two requests for Gray to come to work there. She testified that she went to where Gray's timecard was kept and discovered that she did not clock out. Thacker, without saying why, told Hickman she should check Gray's card. Hickman testified that she attempted to do so about 3:30 that day, but that the card was mysteriously missing. Chapman testified that she saw Gray leaving work that day and asked Gray if she had clocked out and back in that day, because Hickman ''told me to made sure I reminded her.'' According to Hickman, Gray replied that she had forgotten to clock in and Chapman told her she could ''write it in, date it . . . and sign it.''

Hickman testified that she returned to the unit that evening and discovered Gray's card still missing. The next day she found the card back in its slot, but the card did not reflect Gray's trips on November 5 and 7. Hickman testified that she took the card to Carter, as she had already spoken to Carter the previous day about the card's disappearance.

On November 8, Gray reported to work at 7 a.m., and was assigned to the desk on the fifth floor, working there until 2:30 p.m. At that time she was instructed to report to the Hospital office. She went there and met with Hickman, and the Hospital's assistant administrator, Dorothy Carter. Hickman said there was a problem with Gray's timecard, that Brenda Chapman had told her to clock out for her trip to the store the day before, and that she had committed a Federal offense by falsifying her timecard.

Gray responded that she did not hear Chapman tell her to clock out and offered to correct her timecard. Carter said it was too late and Gray would be sent home without pay while the matter was investigated. According to Gray, Hickman noted that Gray had permission from Chapman to go to the store, but was guilty of not clocking out and in.

On November 13, Hickman called Gray and told her to report to Carter the next day. On November 14, Gray met with Carter, Hickman, and Deskins. Deskins said they had investigated Gray's timecard and the Hospital was going to dismiss her for insubordination. Gray said other employees were doing what she had done all the time without being disciplined. Deskins responded that anyone caught doing the same thing would be terminated. Gray had never before been disciplined for anything. According to Gray, the first time she was told that she should clock out for leaving the Hospital to run an errand was at her suspension on November 8.

She had left the Hospital on November 5 to sign a mortgage note and was gone for 15 minutes. On that occasion, she asked permission from Hickman and received it. According to Gray, Hickman said nothing about clocking out. Hickman testified that she reminded Gray to clock out, but did not check her timecard upon Gray's return to see if she had done so. Gray also recounted an incident on September 19, when she and Bowling went to the bank to cash payroll checks. She was gone for about 20 minutes that time. Nothing was said to her on this occasion about clocking out. She remembered other occasions when she ran errands for the unit without clocking out, with the knowledge of unit personnel. She noted that employee Nicki White had left the hospital in May to get a dress for her daughter, with Brenda Chapman's permission. Gray overheard White ask if she had to clock out and Chapman told her no.

On those occasions when Gray has forgotten to clock in when reporting to work or clock out when leaving, she had corrected her timecard later. She had never been told that failure to clock in or out for short errands could result in discipline, including termination.

Respondent terminated Gray for ''Violation of Hospital Policy—Category I Offense.'' For some time the Hospital has had a written policy requiring, inter alia, that ''If it is necessary for an employee to leave the Hospital before completion of the shift, he/she will check out upon departure.'' The Hospital's most recent policy, dated June 27, 1990, states, additionally, that ''falsification of time and attendance records are serious violations of Hospital Policy'' for which ''Offenders will be subject to severe disciplinary action and possible prosecution.'' Since at least 1981, the Hospital has likewise, maintained a written disciplinary action policy which prohibits, under penalty of discharge, ''Willful insubordination'' and ''Falsification of any reports, records, or information.''

To the extent that there are credibility differences between Gray and the other witnesses testifying about the circumstances of her discharge, I credit Gray. The General Counsel had proven that there existed animus toward Gray because of her union support, and the actions of Hickman, Chapman, Thacker, and Carter with respect to the events in question appear to me to be an attempt to find a way to get rid of Gray. Having observed Gray, I find it unbelievable that she would not have clocked out and in on the dates in question if she were told to do so. This is especially true if one believes Brenda Chapman's testimony that she told her to correct her card as Gray was leaving work on November 7.

It is not as if Gray were getting away with something. Hickman and Chapman had given their permission for Gray to leave the Hospital to run errands on November 5 and 7. Neither the matter of her being away from work or the duration of her absence was of concern to them. The total amount of money the hospital was out, if Gray got away

[9] Thacker, a supervisor, remembered both Hickman, on November 5, and Chapman, on November 7, telling Gray to clock out and back in. Another RN in the unit, Gwen Durkey, also testified that she heard Gray receive permission to leave on both occasions, and remembers Hickman telling Gray to clock out on November 5, but not Chapman saying that on November 7.

with not clocking in or out, was less than $10. Yet for this minor amount of money, Gray was not confronted by Hickman on November 7 or 8 and warned of the potential consequences of not clocking out and in, or told to correct the card; instead, Hickman went on November 7 and 8 to the Hospital's assistant administrator, who waited until the end of Gray's shift and then effectively terminated her. The Respondent officially suspended her pending investigation, but what was there to investigate? Hickman knew on November 7 that Gray had not clocked out and in on November 5 and again on November 7. She had already spoken to Chapman about it on November 7. If Hickman instructed Chapman to be sure to tell Gray to correct her card on November 7, why would she not be willing to let Gray make the correction on November 8. Gray was an employee without prior discipline on her record and had just received a satisfactory rating on her work duties. I do not believe that Gray was told to clock in or out on the dates in question and do not believe that she was given the opportunity to correct her card as indicated by Chapman.

I believe and find that Gray was discharged because of Respondent's union animus and for no other reason. No other hospital employee had been discharged for a similar offense in over 15 years, though there is ample credible evidence that it was common for employees to leave the Hospital for short periods during the workday without clocking in or out. Hickman and Chapman admitted that they never warned Gray of the possible consequences for failing to clock in or out. Gray credibly testified about other instances in which she and other employees were allowed to leave the premises for errands and not clock in or out. Her testimony is buttressed by the fact that her timecards throughout her entire employment disclose only one occasion, in her first week of employment in October 1989, when she clocked in and out during working hours. On that occasion, Gray's timecard was corrected to indicate that she should be paid for her 28 minutes absence. As I noted above, I find the true motivation for discharging Gray was for her union support and the reasons given by Respondent are purely pretextual. Given the Hospital's demonstrated lax treatment of employees not clocking in and out to run short errands, and the matter of being gone from work is not of concern, and the failure of the Hospital to discipline any other employee for similar action, I do not believe the Hospital has demonstrated that it has any legitimate business reason for its actions, and certainly has not demonstrated that it would have taken the same action absent Gray's union activity. Accordingly, I find that Respondent has violated Section 8(a)(1) and (3) of the Act. See *Wright Line*, 251 NLRB 1083 (1980).

F. *Did Respondent Discriminatorily Issue Rapunzel Halla Written Warning and Change Her Job Duties Because of Her Activities in Support of the Union?*

This section discusses complaint paragraph 6(h). Rapunzel Hall went to work for Respondent in August 1985 and has worked there ever since, as a pharmacy technician. Her performance evaluations both before and after the incident in question show her to be an excellent employee. On August 20, Hall became involved in the Union for the first time by signing an authorization card. Thereafter, she participated in handbilling outside the Hospital with other employees. Then, on November 1, Hall was given a written reprimand and her job duties, which she testified that she liked very much, were changed.

The situation that Respondent contends caused the warning to be given began in the fall of 1990, when the Hospital discovered a major inventory shortage in floor stock medications and supplies stored in the pharmacy. The shortage was brought to the attention of Pharmacy Director Pat McCoy in a meeting with the Hospital's chief financial officer, Norris, and controller, Vinson, on October 23. To ascertain the source of the shortage, McCoy was instructed to retrieve all of the requisitions, called ''green sheets,'' from throughout the past fiscal year, reflecting the request for and dispensation of floor stock items to the other areas of the Hospital.

Hall, who was solely responsible for the processing and monthly summarization of all green sheets, explained the process she goes through in keeping track of floor stock. In summary, on a monthly basis, she inputs the data from individual green sheets, including the item requisitioned, its cost, and, inter alia, the department that received the item. Some floor stock items are charged, for accounting purposes, as pharmacy charges, while others are simply floor-absorbed charges, referring to patient care areas. This data is entered into a ''dummy'' file in the computer, meaning that it is not accessible or stored anywhere else, whereupon Hall generates a written printout of totals on a monthly basis. Hall delivers this printout or report, by hand, to McCoy or her secretary, Verda Prater. The report is due 4 days after the close of each month. At the end of the fiscal year, the dummy file is purged. As clarified by McCoy, Hall's monthly summaries are translated by Prater into a handwritten report that McCoy later signs and is then transmitted to the accounting department. McCoy does not compare Hall's dummy file printout to the handwritten translation prepared by Prater in the ordinary course of business.

Following her meeting with the Hospital's financial officers on October 23, McCoy returned to the pharmacy at 6:30 p.m. and instructed the hourly employees, called technicians, to begin a recomputation of pharmacy floor stock dispensations for the entire fiscal year, starting ''from scratch'' with the green sheets. McCoy stressed the need to complete the project as quickly as possible and to utilize all overtime necessary.

Overnight, it occurred to McCoy that perhaps the information she had instructed the technicians to regenerate remained in the dummy file on the computer as generated by Hall. Incredibly, it did not occur to her that this very same information was readily available from the reports that Hall gave to her on a monthly basis. In any event, according to McCoy, she asked Hall the next morning if it were possible to retrieve the reports from her files and Hall replied that her files had already been purged. The Hospital's fiscal year had just ended. Hall did not mention the printed reports she generates for initial transmission to McCoy and Prater. If one believes McCoy, presumably, Hall did not think Hall would ask for a new printout if she still had the report Hall had given her. Hall credibly testified, however, that she asked McCoy why the employes were regenerating information that she had already given McCoy in the monthly reports. According to Hall, McCoy asked if she could retrieve the reports from her computer and she informed McCoy that the information had been purged in the ordinary course of business.

McCoy tells a slightly different version. She testified that the next day, October 25, she asked Hall what she did with the information once it was entered into the computer. For the first time, Hall told McCoy, her immediate supervisor and the recipient of the monthly reports, about the monthly reports and informed McCoy that she should have the information in her possession. McCoy began a search for the reports and ultimately found them, misfiled in her office. She described her office thusly, ''It was—my office is more like a store room, than an office. It is very cluttered . . . It was in a group of other generated documents, that all from the inventory—that came from the inventory side, from the data processing.''

McCoy, on locating the printouts, informed the technicians that she could not believe that all the overtime had been expended trying to reproduce what was already in the reports. She claims Hall smiled and said, ''Well, it was a waste of time, wasn't it.'' Hall denies this comment, and I credit her denial. Hall was a very credible witness and observing her, I simply do not believe that she made the remark attributed to her or for that matter is capable of making such a sarcastic remark.

McCoy testified that she concluded that Hall had misled her by not revealing the existence of the printouts earlier in the process. In a memo to Deskins, McCoy reported the events that had occurred and the basis for her belief concerning Hall's lack of cooperation. In part, she wrote: ''Rapunzel Hall clearly answered each question with an answer, however, not the appropriate answer. She answered my questions, but avoided divulging any information that would assist in the effort and dilemma we were in. Her 'non-participatory' answers delayed our report and cost the hospital in over-time expenses and many [sic] unproductive work by salaried employees. She did not answer any question openly, honestly, or explicitly.''

On November 1, Hall was given a written reprimand and the job function of putting the green sheet information on the computer was given to another employee. According to the Pharmacy Manager Roy Reeser, Hall stated to him at the time when the warning was given, ''If I had known what you wanted, I would have given it to you.'' The warning, in my mind, clearly indicates that McCoy believed that Hall's union support played a part in the October incidents. It reads:

> As director I must maintain the integrity of the pharmacy and its position within the hospital structure. I can not, and will not tolerate behavior that is clearly intended to undermine the integrity of the pharmacy department and its function within the Hospital. Specifically, I cannot and will not countenance behavior which attempts to walk a fine line between the letter and the spirit of our disciplinary policies and generally accepted standards of behavior. Through what was clearly dishonest and insubordinate omission on your part the hospital was forced to unnecessarily spend up to $1,000 or more in overtime pay not to mention inconvenience to many salaried employees.
>
> You clearly chose not to retrieve information which resulted in both overtime and other costs to the hospital and a delay in closing the books for the fiscal year ending September 30, 1990.
>
> Allowing you to remain in your present position would not only jeopardize your career here at the hospital, but would clearly not be in the best interest of the pharmacy and ultimately the hospital.
>
> Therefore, I'm removing you—effective immediately—from all Inventory Related activities. Your new assignment will consist of technician duties with an emphasis on out-patient pharmacy.
>
> Not only do I expect you to follow the letter, but I also expect you to follow to the spirit of Hospital Policies and Procedures. I require from you an immediate and on-going improvement, in your cooperation with me and other supervisory and non-supervisor hospital employees and your support of the hospital.
>
> I will not tolerate:
> Dishonesty
> Insubordination
> Refusal to obey reasonable instructions
> (All of the above either by omission or commission)
>
> I expect you to fulfill your duties in the same manner as I expect all other pharmacy employees to fulfill theirs. Additionally, I expect you to cease disruptive behavior which has the effect of interfering with the work performance of other employees.

It is clear from the evidence that Hall did absolutely nothing wrong. The fact that her supervisor, McCoy, did not remember that she was in possession of the information that she ordered employees to work overtime to regenerate cannot conceivably be Hall's fault. If fault is to be placed, it is clearly that of McCoy. I also do not credit any of McCoy's attempts to read any sarcasm or willful lack of cooperation or insubordination into Hall's interaction with her during this incident. Hearing McCoy testify, and then reading the warning notice, it becomes clear that McCoy wanted a reason to threaten and discipline Hall without regard to the inventory situation. There is no evidence of any ''disruptive behavior'' by Hall, or any lack of ''support'' for the Hospital, except for her union activities. I believe and find that the warning given to Hall and her change in job duties was solely because of her union activities and not for the pretextual reasons given. I find that the warning and job change are actions in violation of Section 8(a)(1) and (3) of the Act. *Thurston Motor Lines*, 263 NLRB 1101 (1982); *Gulf Envelope Co*., 256 NLRB 320 (1981); and *Luk, Inc*., 255 NLRB 976 (1981).

G. *Did Respondent Constructively Discharge Phyllis (Gibson) Campbell Because of Her Union Support and Activities?*

This section discussing complaint paragraph 6(c) that alleges that on or about August 13, 1990, the Hospital constructively discharged Phyllis Campbell.[10] Campbell first came to work for the Hospital as a nursing assistant in 1968, a position she still held in 1990. She had been one of the strikers in the 1970's strike and was reinstated in 1981 after the issuance of a Board Order.

Campbell worked on the Hospital's fourth floor in 1990, assigned to the first, or 7 a.m. to 3:30 p.m. shift. Her imme-

[10] At the time that the events in question occurred in 1990, the alleged discriminatee's name was Phyllis Gibson.

diate supervisor at the time was Teresa Newsom. Newsom was, and is, the unit manager for the telemetry unit located on the Hospital's fourth floor. Newsom has worked at the Hospital for 14 years, having held management positions since 1983. Newsom was responsible for the work schedule of employees assigned to the fourth floor. She prepares 4-week schedules for fourth floor personnel, which are published before the expiration of the current schedule and were, in the fall of 1990, posted on a bulletin board at the nurses' station. As a matter of scheduling policy, employees have been instructed by Newsom to advise her of requests for specific days off not later than the third Monday of the current schedule. Campbell knew of and had conformed to this scheduling policy in the past.

The events leading to Campbell's leaving the employ of the Hospital as described by Respondent's witnesses follows. On August 9, at about 9:30 a.m., Campbell paged Newsom on Newsom's pager. Newsom returned the call from the nursing office and, in conversation with Campbell, was informed by Campbell that she needed August 22 and 23 off from work because her son was having surgery. Newsom inquired about the nature of the surgery and was informed that it was elective, and that her insurance carrier had preapproved the surgery through August 23. Newsom also learned from Campbell that her son's surgery had been pending for 3 months.

Newsom told Campbell that she was ''downstairs'' but that she would call her back after checking the schedule. Newsom checked the schedule and called Campbell, informing her that there ''was not enough personnel on the floor'' to allow her to grant Campbell's request to be off on August 22 and 23. Newsom asked Campbell to see if the surgery could be rescheduled for another 2 days and to call her back. Gibson said, ''fine,'' and hung up.

Campbell did not call back, instead approaching Newsom at the fourth floor nursing station the next day, Friday, August 10. While standing in the vicinity of the telephone, Campbell told Newsom that she had the days changed to August 16 and 17, and asked Newsom to check the schedule to see if Newsom could allow Campbell to have those days off. Newsom and Campbell checked the schedule and Newsom told Campbell that she could have a vacation day on Thursday, August 16. Newsom asked Campbell if she could trade shifts with someone else on Friday, however, because there were not enough people scheduled for Friday. Campbell said she would try to trade with someone.

On Monday, August 13, Campbell came to Newsom's office during the morning hours. Campbell was upset. Campbell confronted Newsom and told her that she was going to have to quit. Newsom asked why and Campbell informed her that she could not get anybody to trade shifts with her so that she could have Friday, August 17, off. Newsom told Campbell to wait, that they needed to talk about the matter further, but that a witness was necessary. The two of them proceeded to the first floor nursing office, with Campbell complaining about the unfairness of the situation and the importance of her son's surgery.

No one was in the nursing office when Campbell and Newsom arrived, so Newsom suggested that they go to Shirley Coleman's office on the fifth floor. When arriving there and locating Coleman, Newsom explained to Coleman why they were there and explained the problem. Campbell said she had not been able to trade shifts. Coleman asked if she had tried any of the other shifts. Campbell said she did not know she could do that. Newsom asked Campbell what her off-day was so that they could see about trading. Campbell said that ''today'' was her off day and that she had come to work so that Newsom could give her another day off. Newsom told Campbell that it looked like she was going to have to give her another day off. Newsom left and went to the nursing office. Shortly thereafter, Campbell left telling Coleman that she was going back to the fourth floor. Coleman joined Newsom in the nursing office because she felt that Carter needed to know what was going on on her floor.

While Newsom and Coleman were explaining to Carter what had just happened, Campbell came into the office and requested a resignation slip. Carter asked what was the matter and Campbell said she was just going to have to quit because she could not get off for her son's surgery. Newsom and Coleman left the nursing office at that point. Shortly thereafter, Carter called Coleman and asked her to return to the nursing office, that Campbell had resigned, and requested Coleman escort Campbell to the fourth floor to collect her things.

In the resignation form signed by Campbell, dated August 13, she stated her reason for leaving: ''I quit because I feel I am unfairly treated.''

Campbell's version of the events in question shares only the foregoing reason for leaving in common with Respondent's version. The following is her description of the events that led to her leaving her employment. She began her testimony by relating the substance of an alleged earlier conversation with Newsom, that is the subject of independent complaint paragraphs, specifically, paragraphs 5(a)(i), (ii), and (iii). Campbell testified that on August 1, she, two other employees, and Newsom had a conversation at the nurses' station. According to Campbell, Newsom told the employees that she was against the Union and that the employees were not ''to go to other floors and discuss anything. That we're not allowed.'' Campbell testified that Newsom restricted conversations about the Union only to breaks away from the floor and at lunch. According to Campbell, prior to this date, she and other employees were allowed to go off their floor on breaks. She also testified that thereafter, another employee voiced antiunion statements while working. There was no showing that this statement was in the presence of or overheard by a supervisor, however. Newsom flatly denied making these statements. Based on my credibility findings with respect to Campbell, I will not credit her testimony about Newsom's alleged restrictions. At least two other employees employed on the fourth floor testified in this proceeding and neither corroborated Campbell's assertions in these regards, though one of these, Alpha Carroll, was a staunch union supporter. Campbell signed a union authorization card on August 6, and obtained the signature of other employees on several more.

The surgery required for her son had to be performed in Lexington, Kentucky, and Campbell was informed by the surgeon that it would be done August 14 and 15. To get time off to be with her son, Campbell phoned Newsom on August 9. Newsom would not talk with her saying she did not have the time. Campbell called Newsom again later in the day and made her request. Newsom said Campbell could not have days off ''for anything.'' Campbell had at least 1 week's va-

cation accrued at this point. Campbell then called the surgeon and rescheduled the surgery for August 16 and 17. Campbell returned to work on Friday, August 10. She testified, ''I tried to talk to Teresa about it again, Ms. Newsom. And she said that I couldn't have it off.'' Campbell then asked if she could have the time off for her Independence Day Holiday that she had worked but had not had time off. In addition, she offered to come in to work on her next day off, Monday, August 13. Newsom made no reply that Campbell took as an indication of approval. Instead, Newsom said that Campbell had to find another employee to work in her place. Campbell testified that she asked everyone on the day shift to trade with her, but no one could take her place.

On Monday, August 13, Campbell went to work on her day off, expecting that she could be off for her son's surgery. Campbell also checked with the surgeon's office and was told that her son's surgery could not be put off because insurance approval was running out. That morning, Campbell went to Newsom's office to talk about the surgery. Campbell again explained her problem, only to be told by Newsom, ''I told you you couldn't have a day off for no reason.'' Campbell replied, ''Do I have to quit to be able to help my son have surgery?'' At that point, Newsom accused Campbell of threatening her, and took Campbell to see Carter. She was not in, so they went to see Coleman.

Campbell recalled that Newsom ''talked to me real mean. She said I was lying about the approval of the insurance company.'' Campbell tried to explain her side of the story, ''But Teresa Newsom kept on interrupting, and Shirley said, 'Phyllis, when's your next day off?''' Campbell said that today was her day off, but that she had come in to work in order to be off later in that week for her son's surgery. At that point, Newsom accused Campbell of ''making your own schedule . . . .'' Newsom left the room to find the work schedule and Campbell began crying. Campbell left the room and went to the cafeteria. She was called back to the nurses office by Coleman. Once inside the office, Carter asked what was going on and Campbell explained the problem. She asked Carter if she had to quit for her son to have surgery. At that point Carter left the office and returned with a resignation form and instructed Campbell to sign it and put the reason for signing it. Campbell did sign the resignation.

I have carefully considered the testimony of the witnesses testifying about the events surrounding the resignation of Campbell and believe that the testimony of Respondent's witnesses Newsom and Coleman is more consistent, and more credible than that given by Campbell. Respondent on brief has pointed out several inconsistencies in Campbell's testimony with which I concur. For example, Campbell attempted to portray Newsom as wholly unwilling to consider any relief from the schedule in order to enable Campbell to be off to attend her son's surgery. On direct examination by the General Counsel, Campbell said a number of times that Newsom told her that she could not be off ''for any [or no] reason.'' Yet, she admitted that on Friday, August 10, Newsom told her she could be off if she could ''get somebody to work in my place,'' and volunteered that Newsom did not tell her that the person with whom she could trade ''could be on the evening shift or nights.''

If, as Campbell attempts to establish, Newsom remained unwilling to even consider her request for a deviation from the schedule as late as Monday, August 13, when she purportedly told Campbell, ''I told you you couldn't have a day off for no reason,'' her admission concerning Newsom's prior advice about shift-trading belies any such inference. Further underscoring this point was Campbell's failure to reveal, until cross-examination, that Newsom, in fact acceded to her request to reschedule Thursday, August 16, as a vacation day when Campbell informed her of the doctor's willingness to perform the surgery on August 16 and 17. In her direct examination, by contrast, Campbell said only that when, on the morning of August 10, she informed Newsom of the rescheduling, Newsom made the statements that Campbell ''couldn't have it off,'' and, inconsistently, that Campbell ''had to get somebody to work in [her] place.''

By allowing the rescheduling of 1 of the 2 days Campbell sought to be off, and authorizing a trade of shifts to accommodate the second of those requested days, the Hospital, in my opinion, made a reasonable attempt to accommodate its staffing needs and Campbell's need to be off. As of the day she resigned, August 13, Campbell had several options open to her aside from resigning. She could have continued to seek someone with whom she could trade days, having not explored the possibility of trading with someone on another shift. She could have awaited further word from Newsom who had just advised her that she was going to recheck the schedule. She could have contacted her son's doctor and/or her insurance carrier to ascertain the options she had with them to reschedule the surgery. She could have called in on Friday, August 17, and suffered, at worst, an unexcused absence and whatever arose therefrom, as she had done a month or so earlier in connection with a problem with her car. Though she testified that she thought she might be fired when asked why she did not use this last option, I cannot see how that fear is justified in light of her previous experience calling in that summer. Even if she were correct, the outcome would be the same as quitting.

I also have trouble finding that Respondent had knowledge of her union support. Campbell's name was not on list of employee organizers and did not testify about any overt union activity that would have come to the attention of Respondent. Unlike Webb, Hall, and Gray, whose union support was either readily observable or was admitted to Respondent's management, Campbell did not make herself visible as a union supporter. I think it is reaching to make the assumption that since Campbell went on strike in 1971 that she was in support of the Union in 1991. In any event, I do not believe union animus played a part in Respondent's treatment of Campbell in her request for days off. It was not convincingly demonstrated that the involved department of the Hospital acted differently toward Campbell than other employees, and contrary to Campbell's testimony, I find that the Hospital was still affording Campbell ways to satisfy her need to be off at the time she resigned. I therefore find that Campbell voluntarily quit her employment and was not constructively discharged as alleged in the complaint. To date, she has not requested reemployment with the Hospital.

H. *Did Respondent Unlawfully Engage in Surveillance of Employees by Use of Employee Support Teams?*

This section discusses complaint paragraph 5(f). In or about September 20, Respondent instituted what it calls Employee Support Teams (teams), and what some employees call the ''Rat Patrol.'' The teams were groups of manage-

ment personnel from all departments who purportedly were supposed to roam the Hospital's floors and be of assistance to the shift coordinators in case they needed help. This makes little sense because many of the team members had no professional training to assist in the areas they roamed. For example, how team members such as the Hospital's chaplain and its maintenance director could assist the nursing department shift coordinators is speculative at best. Yet they were on the team assigned to the nursing department. Deskins admitted they could not assist in patient care duties.

Given the timing of the formation of the teams, and their disbandment after the end of the organizing campaign, I believe their sole function was to surveil the employees and to stifle any worktime union discussions and activity. Indeed, team member and Pharmacy Manager Bob Reeser virtually admitted this was the purpose of the teams. In response to a question concerning the last time he worked as a team member, he answered, ''I am not even sure exactly if it went into 1991 on the surveillances or not.''

Though Respondent might argue that this was just an unfortunate choice of words, the evidence strongly supports this candid description of the mission of the support teams. Rapunzel Hall testified that Reeser, her department manager, told her that he had been assigned to the team because of her union activities. Though Reeser testified that he could not recall making such a statement, I credit the testimony of Hall. She was a very credible witness and her testimony rings true, especially in light of Reeser's admission noted above.

Other employees described their encounters with the team. Lisa Smith, RN, testified, ''They'd [team members] just sit around or stand at the nurses' station and they'd talk to us, that sort of thing.'' Barbara Coleman, nurses aide, saw the same thing. Linda Gunnels, LPN, remembers the members coming around to her floor, ''Some of them would talk, some of them wouldn't.'' She also recalled that Myra Checko from the personnel relations office ''would sit down and tell ghost stories.'' Jeffrey Williamson, RN, testified that the team members, ''Mainly they just walked around and observed things.'' Bruce White, a painter in the maintenance department, testified that one night he was working late in the nurses lounge when Supervisor Hiram Little from the admissions office stopped by. According to White, Little was on team duty. Little told White that he did not know what his team duties were, but that he had been told to ''ask people if they need help.'' Little, half jokingly, asked White if he needed help. White replied, ''Not unless you want to help me hang wallpaper.'' Little laughed and walked on.

Most of the employee witnesses in this proceeding called the teams the rat patrol, and viewed the team members as monitoring their activities or spying on them. I find such surveillance to be coercive, having as its purpose the chilling of union support. This is especially true when one considers that at the same time the rat patrol began operating, Respondent's supervisors began enforcing the no-solicitation policy of the Hospital by removing union literature from bulletin boards, and began informing employees not to talk about the Union at work. Under the circumstances, I find Respondent's rat patrol to constitute unlawful surveillance in violation of Section 8(a)(1) of the Act. *Baddour, Inc*., 281 NLRB 546 (1986); *Atlantic Forest Products*, 282 NLRB 855 (1987); and *New Process Co*., 290 NLRB 704 (1988).

I. *Did Respondent Unlawfully Restrict the Distribution of Union Literature in its Parking Areas?*

This section discusses complaint paragraphs 5(p) and (Q). It is possible that the evidence supporting these allegations also supported complaint paragraph 5(j). I cannot find in the record, however, evidence clearly relating to the allegations of paragraph 5(j) and feel compelled to dismiss it for that reason.

With respect to paragraphs 5(p) and (q), the evidence shows that on several occasions during the campaign, groups of employees gathered together before the start of their shifts to distribute union literature to those employees who were changing shifts. Each time, the groups of union supporters would stand outside the hospital near the employees' entrances, and each time, they were ordered off Respondent's property by the hospital security guards.

Alpha Carroll, the fourth floor ward clerk, recalled that one time in September 1990 she was with other employees in the back parking lot one morning when the security guards told them to leave. On another occasion in October, a group of employees went out early in the morning to pass out union literature outside the front of the hospital when two security guards came out and told the employees that they could not pass out their union literature on hospital property, that they would have to go out to the highway. Barbara Coleman recalled that one morning, she was with a group of 15 to 20 employees at the entrance to the Hospital to pass out union literature before shift change. Coleman testified that while she and the other employees were outside passing out the literature, two security guards told them they could not pass out literature there. At that time Coleman was standing about 10 feet from the main highway near the entrance to the Hospital. Additionally, the guards asked for the names of the employees passing out literature.

Ruth Thacker, an employee in medical records, testified that she was with other employees on the morning of October 15, near the front door of the Hospital, when Housekeeping Supervisor Ron White came out with two security guards and told the employees that they would have to move to the public highway to pass out their union literature. Thacker testified that they did as ordered, but once on the edge of the highway, a security guard asked her for her name. The security guards remained near the union supporters for 15 minutes. Apparently because Thacker had refused to divulge her name to the security guard, White followed her into the medical records office once she began work that morning. Thacker testified that he then asked her for her name. Again, she refused to give it and instead pointed to another supervisor, and suggested to White that he ask her what her name was.

Respondent offered no explanation for its actions in this regard, only attempting to show during cross-examination of employee participants in the actions that some of the handbillers might have been blocking the ingress and egress of other employees, patients, or visitors. I cannot find that Respondent established that the handbillers were actually blocking any entrance for this cross-examination. Moreover, no explanation was offered for the guards telling the handbiller to leave rather than simply move a few feet away from an entrance, if in fact the handbillers were blocking such entrance. There was likewise no explanation for asking for the names of the handbillers. Having totally failed to

offer any legitimate reason for requiring the handbillers to leave the property or for asking their names, I find that Respondent has violated Section 8(a)(1) of the Act by both actions, as alleged in complaint paragraphs 5(p) and (q). See *Mini-Togs*, 304 NLRB 644 (1971); *NTA Graphics*, 303 NLRB 801 (1991); *St. Luke's Hospital*, 300 NLRB 836 (1990); *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989); *Baddour, Inc*., 281 NLRB 546 (1986).

J. *Did Respondent's Supervisors Linda Saylors, Lois Jones, and Barbara Ratliff Discriminatorily Restrict Employees Talking About the Union and Distributing Union Literature?*

This section discusses complaint paragraphs 5(g), (n)(i), and (o). Linda Gunnels, an employee of the Hospital during 1990, testified that on October 12, she, employees Ivan Hackney and Shirley Golf, and Supervisor Linda Saylor were together in the hospital cafeteria. Gunnels asked Saylor ''if and where are we allowed to talk union at the Hospital?'' According to Gunnells, Saylor responded, ''. . . we could not talk it—talk union in any patient care areas. That it would have to be on our break in the coffee shop or the cafeteria.'' Gunnels then asked Saylor if employees were allowed to bring union literature into the Hospital. Saylor said, ''. . . what we brought into the Hospital in our pockets or in our pocketbooks was our own private stuff. But if we were going to hand out union literature, it had to be on our breaks or lunch and it had to be in the coffee shop or the cafeteria.''

Saylor then left the group, returning in about 5 minutes. According to Gunnell's, ''She said that she had went to check to see if she had told me right about the union literature and talking the union. And she told me that we were not allowed to talk the union in any patient care areas which would involve the patient's room, treatment rooms, operating rooms, the hallways or corridors adjacent to patient care areas or the solarium or nurses lounge.'' Gunnels testified that patients came into the nurses lounge to get coffee, though not on a regular basis. The nurses lounge is a working area where employees get the reports given by changing shifts, and where the employees can smoke.

Gunnells also testified that beginning in about July, employees were told to cease soliciting on working time in defined areas of the Hospital. She did so, but on one occasion thereafter she observed an employee in a patient care area selling bows to another employee. There was no showing that this incident was observed by a supervisor.

I can find nothing unlawful in Saylor's conversation with Gunnells, when the conversation is taken in its entirety.

In August, Supervisor Lois Jones called a meeting of the employees on her floor. The meeting was held in the small room behind the nurses station. There, Jones announced that there was now a new policy in effect, that the employes ''could not talk about the Union in the patient areas, in the hallways, stairways, anywhere a patient might be.'' Barbara Coleman, a nurses aide who attended this meeting, testified that she asked Jones if the no-union discussion prohibition included the nurses lounge. Jones replied, ''yes, that included the nurses lounge.'' Coleman testified that she had never seen patients in the nurses lounge. On the other hand, Gunnels did testify that patients came into the nurses lounge for coffee and that it was used for work, in that it was the place the nurses gave reports to one another as shifts changed. As with the Saylor/Gunnell's conversation, I do not find Jones statements unlawful.

Geraldine Coleman testified that on October 10, she asked Supervisor Barbara Ratliff if she and Ruth Thacker were allowed to talk about the Union in the office. Ratliff said no. Coleman then testified that Ratliff said they could only talk about it at break and at lunch. Coleman testified that employees in her department would occasionally sell Avon products or Girl Scout cookies during worktime, admitting, however, that they were told not to solicit during worktime. Although there is no showing that Ratliff enforced the no-solicitation rule she had announced to employees with respect to the selling of items at work, there is likewise no showing that she ever stopped employees from talking about the Union during worktime. She did not tell Coleman to cease talking about the Union, she was asked the Respondent's policy and was given the official policy, which related to all solicitations. I do not think her answer to the question under the circumstances violates the Act.

K. *Did Respondent's Supervisor Judy Steffey Unlawfully Interrogate and Threaten Lisa Smith About Her Union Activities and Promise a Promotion if Smith Abandoned Her Union Activities?*

This section discusses complaint paragraph 5(i). Lisa Smith was a ward clerk for the Hospital in August 1990. In September, she became an RN. She signed a union authorization card in August. She testified that on September 12, she had a conversation with Director of Nursing Education Judy Steffey. According to Smith, Steffey commented what a good job Tummons was doing and that if we gave him time, he would make a change in things. She continued that if the Union came in and Tummons had to play hardball, that he could do that. She then told Smith that she wasn't a ward clerk anymore, that she was an RN and should act and talk like an RN. Steffey said that Smith was presently a staff nurse and that if she joined the Union, all she would ever be is a staff nurse. On the other hand she said, if you don't join the Union, you can be a shift coordinator or a unit manager. According to Smith, at this point Steffey began crying and asked Smith what she thought about the Union and what she had just said. Smith answered her stating that she was on company time and can't tell what she thinks about either. She invited Steffey to call her at home and discuss it.

Steffey recalled the conversation began with Steffey congratulating Smith on becoming an RN. According to Steffey she told Smith that she was going to find her role as a ward clerk and being an RN was going to be completely different. The responsibilities would increase and that she would have opportunities for advancement. As a ward clerk there is no possibility for advancement. She testified that she avoided the union campaign entirely because she knew that Smith was a union supporter through rumors. She denied mentioning Tummons, promising promotions or for that matter, crying.

Both of these witnesses seemed credible. I will credit, however, Steffey's version of the conversation over Smith's. I cannot see why Steffey would have to ask Smith what she thought about the Union when Smith was one of the Union's employee organizers. It is also difficult for me to believe Steffey, who was obviously Smith's friend, and one who had

gone out of her way to assist Smith to become an RN, would threaten her. Having credited Steffey's version of the conversation, I will recommend that this complaint allegation be dismissed.

L. *Did Respondent Unlawfully Order Nurse Jeff Williamson To Leave the Hospital When He Was Off Duty?*

This discussion relates to complaint paragraph 5(h). Nurse Jeff Williamson testified that he knew of no policy of the Hospital about employees visiting the Hospital when they were off duty. He testified that he was informed he could not do so after the campaign began. He recounted an incident in the fall of 1990, when he was at the hospital, off duty, at about 2 or 3 a.m. He testified he was in the cafeteria having coffee talking with some friends. He went to the front lobby to get a soft drink and was observed by Supervisor Patty Akers. She asked what he was doing there. He had learned in the cafeteria that another nurse's mother was in the emergency room, so for lack of a better reason, he told Aker he was there to visit her. He got his soda, returned to the cafeteria, finished his visit with his friends, and swung through the emergency room. Akers was there and told him that the nurse's mother had left. He then went back out the employee entrance of the emergency room and was going down the hall when security told him Akers had asked him to leave. He asked why and was told it was because he was out of uniform, off duty, and had no business there.

Akers testified that she saw Williamson in the Hospital's main lobby at about 4 a.m. one morning in the fall of 1990. She testified that she asked him, ''Jeff, you are not on duty, are you?'' Williamson said, ''No.'' She asked why he was there, and he said he was visiting a friend, coworker Ivan Hackney's mother. Akers testified that she knew that Hackney's mother had been in the emergency room the evening before. She went to see if the woman was in the Hospital, and found that she had been discharged at 11:30 p.m. the previous evening. She was in the emergency room verifying this information when Williamson came into the emergency room. Akers said, ''Jeff, Ivan's mother is not even a patient in the hospital. You need to go home.''

I find that ordering Williamson to leave the Hospital violates the Act. The Hospital did not show that it had a rule, generally disseminated to the employees, restricting the right of employees returning to the Hospital on their off-duty time. The Board has established guidelines for such a rule to protect the right of off-duty employees to express their interest in unions to employees on other shifts. I can understand Akers having an interest in keeping off-duty employees out of work areas so that they do not interfere with the duties of on duty employees. But that reason would not apply to the lobby of the Hospital or the cafeteria. Having no valid rule in effect restricting the right of off-duty employees to come on to the Hospital's premises, and having no legitimate reason for restricting Williamson's access to the public, nonpatient care areas of the Hospital, I find that Respondent violated Section 8(a)(1) of the Act when Akers required him to leave. See *Tri-County Medical Center*, 222 NLRB 1089 (1976); *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989); and *New Jersey Bell Telephone Co*., 308 NLRB 277 (1992).

M. *Did Respondent Unlawfully Render Assistance and Support In the Circulation and Mailing of an Antiunion Petition?*

This section discusses complaint paragraph 5(m), which alleges that on September 14, Respondent, acting through Maudie May, Carolyn Johnson, Sally Stamper, Debra Battistello, Jean Shakey, Betty Martin, and Nina Reynold, and by paying the cost of mailing, assisted, supported, and approved of the circulation among its employees of a petition to dissuade the Union from seeking to represent its employees.

What purports to be the petition in question is General Counsel's Exhibit 27, which in printed part reads:

> Dear Anne Kempski,
>
> We, the employees of Pikeville Methodist Hospital want to thank you for your time put forth in forming a Union. However, there are some employees who have a different view than you. There have been a lot of changes in the past few months within the hospital. We, the employees, feel that these changes have been beneficial to us. We are very pleased with the progress that Pikeville Methodist Hospital has made. We believe that a Union in this hospital is not needed! To some, your time has been greatly appreciated. But to others, we believe that now is the time to leave things as they are and as they are progressing. We believe that enough time has been spent on the Union issue, and we do not want to be Union duespayers.

The petition was signed by about 40 employees, including those persons named in the involved complaint allegation who are supervisory personnel. Judy Webb testified that on September 14, she observed employee Joyce Morris, thought by Webb to be a hospital courier, go into the lab and pass a paper to the technicians working there. The technicians read the paper and signed it. Being curious, Webb followed her as Morris went into another part of the lab. She passed a technician whom she asked what is was that Morris was showing them. This technician told her it was a petition to Anne Kempski telling the Union to ''get on with it or get out.'' Following Morris, she saw three supervisors sign the paper. These were Mary Jo Blackburn, Carolyn Johnson, and Deb Battistello. On cross-examination, Webb testified that she later saw General Counsel's Exhibit 27 at the union office and made an ''educated guess'' that it was the paper Morris was circulating. The General Counsel has the burden of proving the complaint allegations and with respect to this one, he has not done so. There is no proof that General Counsel's Exhibit was the paper being circulated by Morris. There is likewise no proof that Respondent supported, assisted, or approved of the circulation of General Counsel's Exhibit 27, or paid for its mailing. I recommend dismissal of this allegation.

CONCLUSIONS OF LAW

1. The Respondent, Pikeville United Methodist Hospital of Kentucky, Inc. nee The Methodist Hospital of Kentucky, Inc., is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

2. The Union, United Steelworkers of America, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in and is engaging in conduct in violation in violation of Section 8(a)(1) of the Act, by:

(a) Acting through its agent, Lloyd Price, in August 1990, soliciting grievances from employees and promising to rectify those grievances, and taking an employee opinion survey, all with the intent to discourage employees' support of and activities on behalf of the Union.

(b) Acting through its supervisor, Cheryl Hickman, in September and October 1990, coercively interrogating employees about their union activities and sympathies, threatening employees with unspecified trouble if they signed a union authorization card, and prohibiting employees from discussing the Union, all to discourage employees' support of and activities on behalf of the Union.

(c) Creating and utilizing so-called employee support teams in the fall of 1990 for the purpose of surveilling its employees to discourage employees' support of and activities on behalf of the Union.

(d) Discriminatorily enforcing its rules regarding posting of material on bulletin boards by allowing the posting of nonwork related material while prohibiting the posting of union literature, to discourage employees' support of and activities on behalf of the Union.

(e) Acting through Supervisor Patty Akers, in September, 1990, discriminatorily denying access to the Hospital to an off-duty employee, to discourage employees' support of and activities on behalf of the Union.

(f) Acting through Supervisor Ron White, in October 1990, impliedly threatening an employee who had been distributing union literature by asking her to identify herself and asking the location of her supervisor, creating the impression that her union activities were under surveillance, to discourage employees' support of and activities on behalf of the Union.

(g) Acting through its agents and security guards, in October 1990, telling its employees that they could not distribute union literature in its parking lots and ordering them to leave, to discourage employees' support of and activities on behalf of the Union.

(h) Acting through Supervisor Bob Ratliff, in October 1990, orally promulgating a rule prohibiting employees from talking about the Union while eating lunch in the Respondent's paint shop and threatening to prohibit employees from eating lunch in the paint shop, to discourage employees' support of and activities on behalf of the Union.

4. Respondent has engaged in and is engaging in conduct in violation of Section 8(a)(1) and (3) of the Act, by:

(a) Acting through Supervisor Phyllis Bowling, in October 1990, impliedly threatening an employee with loss of her job unless she became antiunion, to discourage employees' support of and activities on behalf of the Union.

(b) Giving its employee Judy Webb an unsatisfactory employee evaluation in September 1990, to discourage employees' support of and activities on behalf of the Union.

(c) Giving its employee Rapunzel Hall, in November 1990, a written warning and changing her job duties, to discourage employees' support of and activities on behalf of the Union.

(d) In November 1990, suspending and then discharging its employee Robin Gray, to discourage employees' support of and activities on behalf of the Union.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not commit the other unfair labor practices alleged in the complaint.[11]

THE REMEDY

Having found that Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and take the following affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully suspended on November 8, 1990, and thereafter discharged its employee Robin Gray, I recommend that it be ordered to offer her immediate reinstatement to her former position or to a substantially equivalent position, discharging if necessary anyone hired to replace her, and to make her whole for any loss in wages or benefits she may have suffered by reason of Respondent's discriminatory actions toward her. Backpay shall be computed in accordance with the Board's policy as set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent unlawfully gave its employee Judy Webb an unsatisfactory employee evaluation on September 9, 1990, and gave its employee Rapunzel Hall a written warning and changed her job duties on November 1, 1990, it is recommended that the evaluation given to Webb and the warning given to Hall be rescinded by Respondent. Any reference to the suspension and discharge of Gray, the unsatisfactory evaluation of Webb and the written warning given to Hall should be expunged from their personnel records and these employees be given written notice of such removal and assured in writing that these unlawful suspensions, discharges, evaluations and warnings will not be used as a basis for future personnel actions concerning them.

It is further recommended that Respondent be ordered, upon request by Rapunzel Hall, to restore her job duties taken away from her on November 1, 1990.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Pikeville United Methodist Hospital of Kentucky, Inc. nee The Methodist Hospital of Kentucky, Inc., Pikeville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[11] My finding that Respondent discriminatorily and unlawfully enforced its rules regard posting of literature is a general one and is based on my findings that Respondent did in fact commit the acts alleged in complaint pars. 5(a)(i), (g), (n)(ii), and (r)(ii).

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

(a) Soliciting grievances from employees and promising to rectify those grievances, and taking an employee opinion survey, all with the intent to discourage employees' support of and activities on behalf of the Union.

(b) Coercively interrogating employees about their union activities and sympathies, threatening employees with unspecified trouble if they signed a union authorization card, and prohibiting employees from discussing the Union, all to discourage employees' support of and activities on behalf of the Union.

(c) Creating and utilizing so-called Employee Support Teams for the purpose of surveilling its employees to discourage employees' support of and activities on behalf of the Union.

(d) Discriminatorily enforcing its rules regarding posting of material on bulletin boards by allowing the posting of non work related material while prohibiting the posting of union literature, to discourage employees' support of and activities on behalf of the Union.

(e) Discriminatorily denying access to the Hospital to an off-duty employee, to discourage employees' support of and activities on behalf of the Union.

(f) Impliedly threatening an employee who had been distributing union literature by asking her to identify herself and asking the location of her supervisor, creating the impression that her union activities were under surveillance, to discourage employees' support of and activities on behalf of the Union.

(g) Telling its employees that they cannot distribute union literature in its parking lots and ordering them to leave, to discourage employees' support of and activities on behalf of the Union.

(h) Orally promulgating a rule prohibiting employees from talking about the Union while eating lunch in the Respondent's paint shop and threatening to prohibit employees from eating lunch in the paint shop, to discourage employees' support of and activities on behalf of the Union.

(i) Impliedly threatening an employee with loss of her job unless she became antiunion, to discourage employees' support of and activities on behalf of the Union.

(j) Giving its employees unsatisfactory employee evaluations, to discourage employees' support of and activities on behalf of the Union.

(k) Giving its employees, written warnings and changing their job duties, to discourage employees' support of and activities on behalf of the Union.

(l) Suspending and discharging its employees, to discourage employees' support of and activities on behalf of the Union.

(m) 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 deemed necessary to effectuate the policies of the Act.

(a) Offer full and immediate reinstatement to Robin Gray to her former or substantially equivalent position, discharging, if necessary, any employee hired to replace her, and make her whole for any loss of wages or benefits she may have suffered by her unlawful suspension and discharge, with interest, in the manner set forth in the remedy section of this decision.

(b) Rescind the unsatisfactory employee evaluation given to Judy Webb on September 9, 1990, and the written warning given to Rapunzel Hall on November 1, 1990, and on her request, restore Rapunzel Hall's job duties taken away from her on November 1, 1990.

(c) Expunge from its personnel records all references to Robin Gray's suspension and discharge, Judy Webb's September 9, 1990 employee evaluation, and Rapunzel Hall's November 1, 1990, written warning, and give Robin Gray, Judy Webb, and Rapunzel Hall written notice that this has been done and assure them in writing that these unlawful actions will not be used as a basis for future personnel actions concerning them.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records, and reports and all other records necessary or useful in complying with the terms of this Order.

(f) Post at its facility in Pikeville, Kentucky, copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply.

[13] 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.''

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

In recognition of these rights, we hereby notify our employees:

WE WILL NOT solicit grievances from employees and promise to rectify those grievances, and take an employee

opinion survey, with the intent of discouraging employees' support of and activities on behalf of the Union.

WE WILL NOT coercively interrogate our employees about their union activities and sympathies, threaten our employees with unspecified trouble if they sign a union authorization card, and prohibit our employees from discussing the Union, to discourage our employees' support of and activities on behalf of the Union.

WE WILL NOT create and utilize so-called Employee Support Teams for the purpose of surveilling our employees to discourage our employees' support of and activities on behalf of the Union.

WE WILL NOT discriminatorily enforce our rules regarding posting of material on bulletin boards by allowing the posting of nonwork related material while prohibiting the posting of union literature, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT discriminatorily deny access to the Hospital to an off-duty employee, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT impliedly threaten our employees who are distributing union literature by asking them to identify themselves and asking the location of their supervisors, creating the impression that their union activities are under surveillance, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT telling our employees that they cannot distribute union literature in our parking lots and order them to leave, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT orally promulgate a rule prohibiting employees from talking about the Union while eating lunch in the Respondent's paint shop and threaten to prohibit employees from eating lunch in the paint shop, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT impliedly threaten our employees with loss of their jobs unless they became antiunion, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT give our employees unsatisfactory employee evaluations, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT give our employees written warnings or change their job duties, to discourage employees' support of and activities on behalf of the Union.

WE WILL NOT suspend or discharge our employees, to discourage employees' support of and activities on behalf of the Union.

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

WE WILL offer full and immediate reinstatement to Robin Gray to her former or substantially equivalent position, discharging, if necessary, any employee hired to replace her, and make her whole for any loss of wages or benefits she may have suffered by her unlawful suspension and discharge, with interest.

WE WILL rescind the unsatisfactory employee evaluation given to Judy Webb on September 9, 1990, and the written warning given to Rapunzel Hall on November 1, 1990, and upon her request, restore Rapunzel Hall's job duties taken away from her on November 1, 1990.

WE WILL expunge from our personnel records all references to Robin Gray's suspension and discharge, Judy Webb's September 9, 1990 employee evaluation, and Rapunzel Hall's November 1, 1990 written warning, and give Robin Gray, Judy Webb, and Rapunzel Hall written notice that this has been done and assure them in writing that these unlawful actions will not be used as a basis for future personnel actions concerning them.

METHODIST HOSPITAL OF KENTUCKY, INC.