Beverly Health and Rehabilitation Services, Inc. and its wholly owned subsidiary, Beverly Enterprises–Pennsylvania, Inc. d/b/a Grandview Health Care Center *and* Service Employees International Union, Local 585, AFL–CIO, CLC

Beverly Health and Rehabilitation Services, Inc. and its wholly owned subsidiary, Beverly Enterprises–Pennsylvania, Inc. and its Pennsylvania Facilities *and* Service Employees International Union, AFL–CIO, CLC for its Locals 585, 668 and District 1199P

Beverly Health and Rehabilitation Services, Inc. d/b/a Grandview Health Care *and* Service Employees International Union, Local 585, AFL–CIO

Beverly Health and Rehabilitation Services, Inc. and its wholly owned subsidiary, Beverly Enterprises–Pennsylvania, Inc. d/b/a Grandview Health Care *and* Service Employees International Union, Local 585, AFL–CIO

Beverly Health and Rehabilitation Services, Inc. and its wholly owned subsidiary, Beverly Enterprises–Pennsylvania, Inc. d/b/a Caledonia Manor *and* Pennsylvania Social Services Union Local 688 a/w Service Employees International Union, AFL–CIO

Beverly Enterprises–Pennsylvania, Inc. and its Pennsylvania Facilities *and* Service Employees International Union, AFL–CIO, CLC, for its Locals 585, 668 and District 1199P

Beverly Health and Rehabilitation Services and its Pennsylvania Facilities *and* Service Employees International Union, AFL–CIO, CLC, for its Locals 585, 668 and District 1199P. Cases 6–CA–27342, 6–CA–27453, 6–CA–27581, 6–CA–27731, 6–CA–28151, 6–CA–28394 (portion thereof), 6–CA–28623, 6–CA–28624, and 6–CA–28760 (formerly 5–CA–26764)

September 27, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On October 24, 1997, Administrative Law Judge William G. Kocol issued the attached decision. The General Counsel filed exceptions and a supporting brief; and Respondents Beverly Health and Rehabilitation Services, Inc. (BHR) and Beverly Enterprises–Pennsylvania, Inc. (BEP) filed exceptions, a supporting brief, and an answering brief to the General Counsel's 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[2] as modified, and to adopt the recommended Order as modified.[3]

1. The General Counsel excepts to the judge's dismissal of the 8(a)(3) allegations concerning the suspensions and discharge of employee Denise Foltz. Assuming arguendo that the General Counsel established a prima facie case that Respondent BEP had an unlawful motive for the disciplinary action, we find, as did the judge, that the Respondent met its *Wright Line*[4] burden of establishing that it would have disciplined Foltz in any event "because [it] reasonably believed that she continued to engage in union

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

In adopting the judge's finding that Respondent BEP's suspension of employee Oneita Say violated Sec. 8(a)(1) of the Act, we find it unnecessary to rely on the fact that Administrator Tamara Montel and Director of Nursing Angela Huffman did not speak directly to the employees who provided statements concerning the events that led to Say's suspension and were not aware of the circumstances under which the statements were given.

We note that *Caterpillar, Inc*., 321 NLRB 1178 (1996), cited by the judge in his decision, subsequently was vacated pursuant to a settlement by order dated March 19, 1998.

We agree with the judge, in rejecting the Respondents' affirmative defense based on *Jefferson Chemical Co.,* 200 NLRB 992 (1972), that "*Jefferson Chemical* is not meant to apply . . . where a respondent is involv[ed in] litigation spanning several years and the General Counsel pursues the litigation in reasonable, self-contained segments." The General Counsel's decision to litigate this case separately from the previous cases was well within his prosecutorial discretion, and does not require dismissal of the complaints in this case. The Board has made it clear that it will not dismiss a complaint, under *Jefferson Chemical*, for failure to consolidate with a previous case, unless it involves an attempt to litigate the same act or conduct as violations of different sections of the Act, or to relitigate the same charges in different cases, neither of which is involved here. See *Service Employees Local 87 (Cresleigh Management),* 324 NLRB 774, 775–776 (1997).

[2] We note that no exceptions were filed to the judge's dismissal of the 8(a)(1) allegation concerning the Respondents' *Beck* letters to employees; dismissal of the 8(a)(3) allegation concerning employee Robert Reed; finding of an 8(a)(5) violation for changing the licensed practical nurses' job descriptions and job duties at the Grandview facility, without bargaining with the Union; and rejection of the Respondents' 10(b) laches, and improper filing or service affirmative defenses.

[3] In accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), we shall change the date in par. A,2(g) of the judge's recommended Order from June 21 to May 5, 1995, and in par. B,2(f) of the judge's recommended Order from June 21, to June 1, 1995, the date of the Respondents' first unfair labor practices, respectively.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

activity during worktime," and, thus, she repeatedly violated the Respondent's lawful rules prohibiting solicitation during working time.

Having found that Foltz was discharged for violating the Respondent's lawful no-solicitation rules, we find it unnecessary to pass on the validity of other reasons the Respondent gave for the discipline, including the claim that Foltz violated Caledonia Manor's disciplinary rule 1.6. The judge credited testimony that Caledonia Manor maintained a rule 1.6 that was worded differently from the rule in effect at the rest of the Respondent's facilities. The complaint alleged only that the rule as it was worded at the rest of the Respondent's facilities was unlawful, and, thus, did not place in issue the legality of the rule in effect at Caledonia Manor.[5] Nor was the legality of the Caledonia Manor rule fully litigated at the hearing. Accordingly, we do not pass on the validity of the rule that was in effect at Caledonia Manor.

2. The Respondents promulgated and maintained two work rules alleged, and found by the judge, to violate Section 8(a)(1) of the Act. Rule 1.6, set forth above, bans the making of false or misleading statements.[6] Based on well-established precedent, which the Board and the D.C. Circuit Court of Appeals have recently reaffirmed, we adopt the judge's finding that rule 1.6 was unlawful. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). We need deal only with rule 1.4, which prohibits "[r]efusing to cooperate in the investigation of any allegation of patient (resident) neglect or abuse or any other alleged violation of company rules, laws, or government regulations."

In finding rule 1.4 unlawful, the judge relied on *Cook Paint & Varnish Co.*, 246 NLRB 646 (1979), enf. denied 648 F.2d 712 (D.C. Cir. 1981). In that case, the Board majority[7] held that, while an employer may lawfully question employees in an investigation prior to discipline, it may not compel an employee to answer questions once disciplinary action is taken, the grievance machinery is activated, and the dispute is to be submitted to arbitration. Accordingly, under this precedent, an employee has a Section 7 right to refuse to cooperate in building a case against a fellow employee once discipline is imposed and an actual labor dispute is underway through resort to arbitration.

Examining rule 1.4 in light of this precedent, the judge determined that an employee reading the rule in a "common sense manner" would reasonably conclude that he would risk discipline by exercising the right to refuse to cooperate in building a case against a fellow employee in a pending arbitration. The judge concluded that the plain language of rule 1.4 would cover the postdiscipline, prearbitration context. He, thus, found that the rule was overbroad to the extent it prohibits employees from freely exercising the right set forth in *Cook Paint*.

Rule 1.4 does not expressly apply to the investigation of a grievance that is pending arbitration, and there is no evidence that it has been applied in that context. The judge, nevertheless, concluded that it could reasonably be interpreted to apply in that context, and, thus, that the rule is overbroad and violates Section 8(a)(1). We need not pass on this conclusion, however, because we conclude that the maintenance of rule 1.4 violates Section 8(a)(1) without regard to the *Cook Paint* rationale relied on by the judge.

The rule compels employees to cooperate, or risk discipline, in the investigation of "any . . . violation of . . . laws, or government regulations." By its plain language, the rule, therefore, clearly applies to the investigation of unfair labor practice charges. In *Johnnie's Poultry Co.*, 146 NLRB 770, 774–776 (1965), enf. denied 344 F.2d 617, 619 (8th Cir. 1965), the Board held that an employer violates Section 8(a)(1) of the Act if it questions employees about alleged unfair labor practices without giving them specific assurances, including an assurance that their cooperation is strictly voluntary. "[I]n *Johnnie's Poultry* the Board recognized that an employer's interviewing of employees in preparation for litigation has a pronounced effect on the exercise of Section 7 rights, which includes protection in seeking vindication of those rights from employer interference, restraint, or coercion." *Bill Scott Oldsmobile*, 282 NLRB 1073, 1074 (1987).[8]

[5] The complaint alleges as unlawful rule 1.6 which is in effect at the Respondents' facilities *other than* Caledonia Manor. That rule provides:

> Making false or misleading work-related statements concerning the company, the facility or fellow associates.

At Caledonia Manor, the rule 1.6 in effect provides:

> Making false defamatory, or malicious statements about a resident, associate, supervisor or the company.

[6] See fn. 5.

[7] Chairman, then Member Truesdale issued a concurring opinion.

[8] Accord: *Standard-Coosa Thatcher Carpet Yarn Div. v. NLRB*, 691 F.2d 1133, 1141 (4th Cir. 1982), cert. denied 460 U.S. 1083 (1983). (*Johnnie's Poultry* recognizes "that a significant risk of coercion arises when an employer questions employees about a union without informing them that they may, with impunity, decline to respond.") Although the Eighth Circuit Court of Appeals denied enforcement in *Johnnie's Poultry* itself, and other courts have not always approved of the Board's application of the *Johnnie's Poultry* standards to specific situations, those courts have denied enforcement because they preferred an "all the circumstances" approach to determining if such questioning is in fact coercive. See, e.g., *Dayton Typographic Service v. NLRB*, 778 F.2d 1188, 1194–1195 (6th Cir. 1985); *A & R Transport, Inc. v. NLRB*, 601 F.2d 311, 313 (7th Cir. 1979), and cases cited therein. They have not disagreed with the basic premise that cooperation in such investigations must always be voluntary. *ITT Automotive v. NLRB*, 188 F.3d 375, 389

By compelling employees to cooperate in unfair labor practice investigations, or risk discipline, the Respondent's rule violates the longstanding principle, established in *Johnnie's Poultry*, that employees may not be subjected to employer interrogations, relating to Section 7 activity, that reasonably tend to coerce them to make statements adverse to their Section 7 interests, those of a fellow employee, or those of their union. If the employees' Section 7 right of mutual protection is to be safeguarded, cooperation must be voluntary. Failure to inform employees of the voluntary nature of the employer's investigation is "a clear violation" of Section 8(a)(1) of the Act. *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 861 (6th Cir. 1990).

Certainly, enforcement of rule 1.4 to compel cooperation in the investigation of an unfair labor practice charge would violate the Act. The question more specifically before us in this proceeding is whether its "mere maintenance" is unlawful. It is axiomatic that merely maintaining an overly broad rule violates the Act. See, e.g., *Our Way, Inc.*, 268 NLRB 394 (1983) (rule prohibiting solicitation during "working hours" presumptively invalid as overbroad because it includes employees' own, nonwork-time periods); *NLRB v. Beverage-Air Co.*, 402 F.2d 411, 419 (4th Cir. 1968) ("mere existence" of an overbroad but unenforced no-solicitation rule is unlawful because it "may chill the exercise of the employees' [Section] 7 rights"). Evidence of enforcement of the rule is not required to find a violation of the Act. See *NLRB v. Vanguard Tours*, 981 F.2d 62, 67 (2d Cir. 1992), citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 fn. 10 (1945). Indeed, the mere maintenance of an ambiguous or overly broad rule tends to inhibit or threaten employees who desire to engage in legally protected activity but refrain from doing so rather than risk discipline. *Ingram Book Co.*, 315 NLRB 515, 516 (1994); *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983).

As noted above, we find the "mere maintenance" of overly broad rules unlawful because such rules tend to chill employees' exercise of their protected rights. We find that rule 1.4 chills the exercise of employee rights as well. The rule plainly permits employer conduct which would be a *Johnnie's Poultry* violation of the Act. It permits the employer to coerce employees, under threat of discipline, to cooperate with an employer investigation of unfair labor practice charges. As such, the rule inhibits protected, concerted activity. Employees engaged in protected activity run the risk of becoming embroiled in an employer investigation into an alleged unfair labor practice. The rule then forces them to face discipline or cooperate with the employer despite their protected right to make common cause with their fellow employees. Given these unpalatable choices, the rule would clearly have the reasonable tendency to discourage employees from engaging in protected activity, which might bring them under the employer's scrutiny during an unfair labor practice investigation. Alternatively, it could discourage them from exercising their protected right to file unfair labor practice charges for fear of becoming embroiled in such an investigation. Accordingly, we find that the maintenance of rule 1.4 violates Section 8(a)(1).

The judge limited his recommended remedy for maintaining facially invalid disciplinary rules 1.4 and 1.6 to the 20 facilities listed by the General Counsel in paragraph 2(b) of the amended consolidated complaint.[9] The General Counsel excepts to the judge's failure to apply the remedy to all of the Respondents' facilities located in the Commonwealth of Pennsylvania, as requested in the remedy section of the amended consolidated complaint.

We agree with the General Counsel that the remedy should be so extended. The record shows that, with one exception (Caledonia Manor), the rules were implemented at all Beverly facilities throughout the Commonwealth, all of which are Respondents in this proceeding. In these circumstances, we find it appropriate as a remedial matter to require rescission and posting of a notice to be coextensive with the Respondents' implementation of the unlawful rules. See, e.g., *Raley's, Inc.*, 311 NLRB 1244 fn. 2 (1993); *Albertsons, Inc.,* 300 NLRB 1013 fn. 2 (1990). We shall amend the recommended Order accordingly.[10]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Beverly Enterprises-Pennsylvania, Inc., Chambersburg, Pennsylvania, and the Respondent, Beverly Health and Rehabilitation Services, Inc., Fort Smith, Arkansas, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph A,2(g).

"(g) Within 14 days after service by the Region, post at its Grandview facility in Oil City, Pennsylvania, copies of the attached notice marked 'Appendix A' and at all its

fn. 9 (6th Cir. 1999) (noting that the circuit's case-by-case approach was not a rejection of the holding of *Johnnie's Poultry*, including its requirement that employee participation must be obtained on a voluntary basis).

[9] The judge recommended that the Respondents rescind the rules and any discipline issued pursuant to the rules, making whole any employees disciplined under the unlawful rules.

[10] As noted above, Caledonia Manor's rule 1.6 differs from the other facilities. We will not order rescission of rule 1.6 or posting regarding it at Caledonia Manor.

Pennsylvania facilities,[11] copies of the attached notice marked 'Appendix B.'[12] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since May 5, 1995."

2. Substitute the following for paragraph B,2(f).

"(f) Within 14 days after service by the Region, post at its Duke facility in Lancaster, Pennsylvania, copies of the attached notice marked 'Appendix C' and at all its Pennsylvania facilities, copies of the attached notice marked 'Appendix D.'[13] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since June 1, 1995."

Stephanie E. Brown and *Leone P. Paradise, Esqs.,* for the General Counsel.

Hugh L. Reilly Esq., of Fort Smith, Arkansas, and *Norman I. White Esq. (McNees, Wallace & Nurick)*, of Harrisburg, Pennsylvania, for the Respondent.

Robert S. Sarason, of Boston, Massachusetts, for the Charging Party.

[11] The notice marked "Appendix B" posted at Caledonia Manor, Fayetteville, Pennsylvania, shall not contain the language referring to rule 1.6.

[12] 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."

[13] See fn. 12 above.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on June 25 and 26, 1997, and in Chambersburg, Pennsylvania, on July 1, 1997.[1] The charge in Case 6–CA–27581 was filed September 25, 1995, and an amended charge was filed on November 18, 1996; the complaint in that case was issued November 21, 1995. The charge in Case 6–CA–27342 was filed June 21, 1995, and an amended charge was filed November 18, 1996. The charge in Case 6–CA–27453 was filed August 4, 1995; first, second, and third amended charges were filed in that case on August 21, 1995, March 1, 1996, and November 18, 1996, respectively; complaint in that case issued on March 14, 1996. A consolidated amended complaint in Cases 6–CA–27342 and 6–CA–27581 also issued on March 14, 1996. All three cases were consolidated by order dated that same day. The charge in Case 6–CA–28394 was filed August 9, 1996, and an amended charge was filed December 23, 1996. The charge in Case 6–CA–28623 was filed November 26, 1996. The charge in Case 6–CA–28624 was filed on November 26, 1996. The charge in Case 6–CA–28760 (formerly Case 5–CA–26764) was filed December 30, 1996. A consolidated complaint in Cases 6–CA–28394, 6–CA–28760, 6–CA–28623, and 6–CA–28624 issued on May 2, 1997. That same day an amended consolidated complaint issued in Cases 6–CA–27342, 6–CA–27581, and 6–CA–27453 and all seven cases were consolidated. The charges in Cases 6–CA–27731 and 6–CA–28151 were filed November 29, 1995, and May 9, 1996, respectively. An amended consolidated complaint in all nine cases (the complaint) issued on May 23, 1997.

The complaint alleges that Beverly Health and Rehabilitation Services, Inc. (Respondent BHR) and its wholly owned subsidiary Beverly Enterprises–Pennsylvania, Inc. (Respondent BEP) maintained disciplinary rules which violated Section 8(a)(1) of the Act. The complaint also alleges Respondents violated Section 8(a)(1) by providing information to employees on how to obtain objector status under *Communications Workers v. Beck,* 487 U.S. 735 (1988). Respondent BEP is alleged to have issued a 2-week suspension to employee Oneita Jane Say, a 3-day suspension to employee Robert Reed, and two suspensions and the termination of employee Denise E. Foltz, all in violation of Section 8(a)(3) and (1) of the Act. The complaint also alleges that Respondent BEP implemented a new policy regarding licensed practical nurses' duties and job descriptions, reduced working hours and modified work schedules of service and maintenance employees, and implemented revised disciplinary rules for employees in violation of Section 8(a)(5) and (1) of the Act. Respondent BHR is also alleged to have violated Section 8(a)(5) and (1) by implementing revised disciplinary rules for employees.

[1] At the close of the hearing on July 1, I gave the General Counsel time to determine whether he desired to present additional evidence in light of Respondent BEP's introduction of documentary evidence which, although subpoenaed, had not been provided to the General Counsel. Ultimately, the General Counsel decided not to present additional evidence. The hearing was closed by order dated July 24, 1997, which document is received into evidence as ALJ Exh. 1.

Respondents filed answers which admitted the allegations of the complaint concerning jurisdiction and certain allegations concerning the filing and service of the charges, labor organization status unit, and 9(a) status. They denied the substantive allegations of the complaint and pled a number of affirmative defenses.

At the hearing, Respondents admitted that Tamara Montell was administrator between October 1994 and October 1996; Donna Puleo was RN supervisor between October 1993 and June 1996; Angela Huffman was director of nursing from March 1995 to date; Theresa Stack was assistant director of nursing from December 1993 to date; Jackie Shaffer was assistant administrator between March 1995 and August 1996; Missy Allen has been housekeeping supervisor at all times material; Carol Lyttle was director of nursing until November 29, 1996; Linda Bandanza was assistant director of nursing from July to November 30, 1996; and Constantine Wright was a supervisor until July 1996. Respondents admit that these individuals were supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act. Respondents further admitted that Michelle Lockhart was director of infection control at all material times and was an agent within the meaning of Section 2(13).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent BHR and Respondent BEP, corporations, are each engaged in the operation of nursing homes at various facilities located in the Commonwealth of Pennsylvania, where they each annually derive gross revenues in excess of $500,000 and directly purchase and receive at their facilities goods and materials valued in excess of $5000 directly from points outside the Commonwealth of Pennsylvania. Respondents admit and I find that Respondent BHR and Respondent BEP are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the nursing homes that they operate are health care institutions within the meaning of Section 2(14) of the Act.

Respondents admit, and I find, that Service Employees International Union, Local 585, AFL–CIO (Local 585), Pennsylvania Social Services Union, Service Employees International Union, Local 688, a/w Service Employees International Union, AFL–CIO (Local 688),[2] and District 1199P, Service Employees International Union, are each labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Respondent BEP is a wholly owned subsidiary of Respondent BHR. Respondents own and operate a number of nursing homes in the Commonwealth of Pennsylvania. The 20 facilities listed in the complaint have employees who are represented by Locals of the Service Employees International Union, AFL–CIO. Of those, three facilities are specifically involved in this proceeding; Duke,[3] Grandview,[4] and Caledonia Manor.[5]

At the Duke facility, Local 668 represents a unit of service and maintenance employees; the most recent contract covering those employees ran from December 20, 1991, to December 31, 1994. Local 585 represents two separate units at the Grandview facility. The first unit, also a service and maintenance unit, was covered by a contract that ran from March 30, 1992, to December 31, 1994. The second unit consists of licensed practical nurses. After an election, Local 585 was certified by the Regional Director to represent that unit on March 11, 1994, in Case 6–RC–10978. The Board upheld that certification.[6] Respondent BEP, however, has decided to test the Board's certification, contending that the LPNs are supervisors. At the time of the hearing that case was set for oral argument before the Circuit Court of Appeals for the District of Columbia.[7]

B. The Beck Letter Allegations

The General Counsel alleges that Respondents violated Section 8(a)(1) by sending letters to their employees advising them of their rights under *Communications Workers v. Beck,* 487 U.S. 735 (1988). Respondents sent a letter that was in all material respects identical to employees in each of the 20 facilities identified in the complaint. One such letter, as an example, is set forth in its entirety below:

> June 13, 1995
>
> Dear Employee:
>
> In the last several months, unions that represent our employees and that are attempting to organize other Company facilities released "reports" on patient care and working conditions at Beverly facilities. These union reports contain numerous false statements about the quality of care you and your coworkers provide. In one of these reports, the union pointed to problems in the State of Missouri that occurred over three years ago that have long since been corrected. They had to go back that far in an attempt to smear the Company's reputation for providing quality care.
>
> Some Employees have expressed their disgust at the union's smear campaign and have asked what they can do to protest the union's underhanded tactics. First, if you disagree with the union's propaganda, you can tell the union bosses that you object to the union's attempt to smear the

[2] The names of Local 585 and Local 688 appear in various forms in the complaint. I conclude that the correct names are those that appear in their most recent contracts.

[3] More precisely known as Beverly Manor of Lancaster (formerly known as Duke Convalescent Center), Lancaster, Pennsylvania. At times in the record and in Respondents' briefs it is referred to as the Lancaster facility.

[4] More precisely known as Grandview Health Care Center, Oil City, Pennsylvania.

[5] More precisely known as Caledonia Manor, Fayetteville, Pennsylvania.

[6] 322 NLRB No. 54 (1996) (not reported in Board volumes).

[7] As this decision was being prepared for issuance, the General Counsel filed a motion requesting that I take administrative notice of the judgment of the Court of Appeals for the District of Columbia enforcing the Board's Order. That motion is granted, and it is received into evidence as ALJ Exh. 2.

care you provide. Second, you do not have to belong to an organization that engages in such tactics. You have a legal right to withdraw from union membership at any time if you should so choose.

One way to protest the union's propaganda is to resign your union membership and become a "proportionate share payer." This means you will only have to pay the fraction of full union dues that directly relates to the union's cost to administer the contract at your facility. With *full membership*, some of your union dues (perhaps as high as 30%–40%) goes to pay for the union's smear campaign and other propaganda activities. If you become a *proportionate share payer*, you will pay a *lower* amount which can be used only to pay for the union's representation activities. The union is required to represent you the same, regardless of your choice.

Those of you who don't want to fund the union's propaganda campaign can request that your membership be converted to "proportionate share payer" status. If you want to become a proportionate share payer, simply fill out the enclosed letter and sent it to your union representative. The choice is entirely yours to make. If you have any questions about becoming a proportionate share payer and paying a *lower* amount each month to the union, you can call the information officer at the Philadelphia office of the Labor Board at 215–597–7601.

I am proud of the outstanding efforts of all Beverly associates to continue delivering quality care to our residents. The Company continues to receive very good reviews of its care from regulators, the community, and the families of those we serve. We at Beverly stand by your excellent record and will defend it.

Thank you for providing the quality care that allows your Company to be the nation's leading provider of long-term health care services.

Sincerely,

Dennis A. McGowen, NHA
Administrator

Attached to that letter was a form letter which is also set forth in its entirety:

Mr. Tom Herman
Union Representative
SEIU
1037 Maclay Street
Harrisburg, PA 17103

Dear Mr. Herman:

I, _____, am an employee of Blue Ridge Haven West Convalescent Center, Camp Hill, PA. This letter will serve as notification that effective immediately I am changing my membership status in the Service Employees International Union, Local 668 from that of a "full member" to that of a "proportionate share payer." Effective immediately, I elect to pay only that portion of the Union initiation fees and dues which are used for Union expenses related to representational activities such as collective bargaining, contract administration and grievance processing, in accordance with my rights under *Communications Workers of America v. Beck* and other applicable federal law. I object to payment of any portion of dues or fees which go to the local, international or any other level of the union, which are spent for nonrepresentational activities.

Check if applicable:

( ) I also wish to exercise my right under *Communications Workers of America v. Beck* and other applicable federal law to request that the union provide me with the required financial details of the funds it expends for representational and nonrepresentational activities, as well as a description of the activities you deem "representational," and "nonrepresentational" so I can verify the accuracy of your calculations.

It is my understanding that effective immediately, I will not be subject to Union fines or punitive assessments.

Dated:_____

Very truly yours,

_____
(Signature)

_____
(Print Name)

These letters issued after Wayne Chapman, regional director for associate relations, sent a memorandum to administrators at facilities where employees were represented by labor organizations. This memorandum, dated June 8, 1995,[8] states that the Supreme Court has ruled that employees do not have to pay the full amount of union dues if part of those dues are used for purposes other than collective bargaining and contract administration. It asserts that a number of employees had expressed an interest in not paying for union political activity and propaganda. The memorandum advises the administrators to mail the letter described above to their employees to give each employee an opportunity to consider the matter.

In *Beck,* supra, the Supreme Court held that a labor organization could not require an objecting employee who was not a voluntary member of that labor organization to pay dues required under a union-security clause, where money collected from the dues was used for activities unrelated to contract administration and grievance processing. In *California Saw & Knife Works,* 320 NLRB 224 (1995), the Board held, inter alia, that a labor organization violates Section 8(b)(1)(A) of the Act when it fails to advise employees it represents who are covered by a union-security agreement of their *Beck* rights.

In defining the General Counsel's position on this issue at the hearing, counsel for the General Counsel conceded that there is nothing explicitly or implicitly coercive in the letter. Counsel for the General Counsel also conceded that there is nothing inaccurate or misleading concerning the description of *Beck* rights contained in the letter. In his brief the General Counsel's argument begins by conceding that the Board has held that an employer may lawfully inform employees of their

[8] All dates are in 1995 until and unless indicated to the contrary.

right to resign from full union membership and even provide employees with envelopes with the union's address to facilitate the resignation, citing *Towne Plaza Hotel,* 258 NLRB 69 (1981).[9] The General Counsel argues that this line of cases is distinguishable in two respects. First, those cases involved a situation where resignation from the union could have a direct bearing on the employee's employment relationship since it occurred in a context of a strike situation. Second, a union is under no legal obligation to inform employees of their right to resign in such a situation, unlike the circumstances in this case where the Unions have an obligation to inform employees of their *Beck* rights. The General Counsel argues that the letter sent by Respondents criticized the Union in a tone that was hostile and antiunion and that Respondents have not established that the letter was in response to any employee inquiries. "Rather, it appears that the letters from [Respondents] were unsolicited, and were motivated by anti-union animus." The argument continues, asserting that since the *Beck* information is duplicative of the information the Unions are required to provide, employees receiving Respondents' letter would reasonably conclude that Respondents were encouraging employees to become *Beck* objectors and that Respondents have interjected themselves in the relationship between employees and the Unions in a matter that has no bearing on employees' employment status. The General Counsel also argues that the timing of the letter, coming after the collective-bargaining agreements had expired at two facilities and near the expiration of the contracts at the other facilities, serves to demonstrate that it was not merely informational in nature but served to encourage employees to become *Beck* objectors at a critical time when the Unions needed employee solidarity. The General Counsel concludes, "There is no doubt that employees reading these letters would recognize Respondent's endorsement of [the *Beck* objector status], and would therefore feel pressure to follow Respondent's encouragement."

Respondents argue that the General Counsel has not established that the letters interfered with, restrained, or coerced employees in the exercise of their Section 7 rights and, thus, no violation of Section 8(a)(1) has been established. I agree.

The Board has long held that the general standard to be applied in determining whether an employer violates Section 8(a)(1) of the Act is whether the employer's conduct can reasonably be said to tend to interfere with the free exercise of employees' Section 7 rights. *American Freightways Co.,* 124 NLRB 146 (1959).

I cull from the General Counsel's arguments two main points. First, because the *Beck* issue does not have a direct bearing on the employee's employment relationship and because the union already has the legal obligation to advise employees of this right, an employer may not lawfully advise employees of their *Beck*. In other words, it is a per se violation of the Act to do so. Second, because the communication to employees in this case occurred in a context of antiunion hostility, Respondents' letters unlawfully encouraged employees to cease remaining full dues-paying members.[10]

I begin my analysis of this issue by recognizing that an employee's decision to become a *Beck* objector is a right as much protected by Section 7 of the Act as the right to become a full dues-paying union member. It therefore does not follow that by advising employees, or even by noncoercively encouraging employees to exercise their Section 7 right to become *Beck* objectors, that an employer would, without more, violate an employee's Section 7 right to remain full dues-paying members. As noted, the General Counsel argues that the *Beck* issue is different from other Section 7 rights in that it does not directly impact the employment relationship. This argument falls due to its faulty premise. The reduction in dues that an employee has to pay from his earnings as a consequence of becoming a *Beck* objector itself has a direct impact on the employee's employment relationship. In any event, even if *Beck* objector status had no bearing on the employment relationship, still the General Counsel's argument would fail because it fails to show how advising employees of their Section 7 right to become *Beck* objectors constitutes interference, restraint, or coercion. If the General Counsel were to prevail in this aspect of its argument, it would ultimately forbid an employer from communicating with its employees on this Section 7 right. Such an imposed silence would run afoul of Section 8(c) of the Act.[11] I thus reject the argument that sending the letter amounted to a per se violation of the Act.

Of course, an employer is prohibited from "interfering with, restraining, or coercing" employees in the exercise of their Section 7 rights, but the General Counsel has conceded that there is nothing explicitly of implicitly threatening or coercive in Respondents' conduct. Examining the letter to determine whether there was any "interference, restraint or coercion," I note that the letter is careful to tell employees that the "Choice is entirely yours to make." There is nothing indicating anything to the contrary. I also note that employees are advised to take their questions on this matter to the Board, thereby avoiding any appearance by Respondents that they might monitor which of their employees became *Beck* objectors. Nor does the General Counsel assert that the letter did more than provide mere ministerial assistance to employees in becoming *Beck* objectors if they so desired. It is clear, however, that the letter noncoercively encourages employees to exercise their right to become

[9] As a technical matter, it appears that the Board did not actually reach that issue in *Towne Plaza Hotel* since the judge dismissed that allegation and no exceptions were filed by the General Counsel to that conclusion. Id. at fn. 2. However, the judge relied on *Mosher Steel Co.,* 220 NLRB 336 (1975), and *Nordstrom, Inc.,* 229 NLRB 601 (1977), in accurately describing Board law on this issue.

[10] The General Counsel's argument also makes reference to Respondents' antiunion motivation in distributing the letters. However, motivation in this type of 8(a)(1) allegation is not determinative; instead, as pointed out above, the test is an objective one. Just as a good motive would not be a defense to conduct otherwise having a reasonable tendency to interfere with employees' Sec. 7 rights, so the presence of an antiunion motive does not serve to convert otherwise lawful conduct into a violation of the Act.

[11] That section provides "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefits."

Beck objectors, however, that alone cannot serve to be the basis for a violation of the Act. In *Towne Plaza Hotel,* supra, there can be little doubt that employees could reasonably conclude that the employer there was encouraging them to resign from the union, yet the Board found no violation. Likewise in cases such as *Amboy Care Center,* 322 NLRB 207 (1996), the Board reiterated its policy that an employer may noncoercively encourages its employees to support one union over another, citing *Alley Construction Co.,* 210 NLRB 999 (1974). Thus, noncoercive encouragement of employees to exercise a Section 7 right, without more, does not violate the Act. The fact that the letter seeks to have the employees exercise that right in the midst of a heated controversy between the Union and Respondents also does not serve to convert the letter into an unlawful act. It is, after all, frequently in the midst of controversy that employees are called upon to exercise their Section 7 rights. *Towne Plaza Hotel,* supra; *Amboy Care Center,* supra. Nor can the fact that Respondents failed to establish that the letters were sent in response to questions from employees serve as a basis to convert this into unlawful conduct in this case; this is but one factor to be considered. In *Alley Construction,* supra, there was no evidence that the employer's conduct in that case was in response to any questions from employees, yet the Board found the conduct to be proper.

It should be emphasized that conduct in this case involves noncoercive, accurate, encouragement by Respondents that employees voluntarily exercise their right to become a *Beck* objector. I conclude that the letter Respondents sent to their employees does not contain statements which could reasonably tend to interfere with, restrain, or coerce employees in the right to become or not become a *Beck* objector. I further conclude that there is nothing per se violative of the Act when an employer accurately advises its employees of their *Beck* rights and noncoercively encourages its employees to exercise those rights. I shall therefore dismiss this allegation of the complaint.

C. The Disciplinary Policy Allegation

The General Counsel alleges that Respondent BHR violated Section 8(a)(5) and (1) of the Act by implementing revised disciplinary rules for employees in the Duke unit, and Respondent BEP violated that same section of the Act by identical conduct involving the Grandview units. By way of significant background, the evidence shows that the parties commenced negotiation in October 1994, for successor contracts involving service and maintenance units at the Duke and Grandview facilities; as indicated above, those contracts were set to expire on December 31, 1994. John Haer, staff director, was chief negotiator for both Locals 585 and 688. Haer received a letter dated January 13, 1995, from Ronald J. St. Cyr, labor relations manager for Respondent BHR, concerning the expiration of those contracts. In that letter St. Cyr advised the Locals that effective January 23, Respondent BHR would not extend the Duke facility contract but it would "maintain the status quo as required law." The letter explained that grievances from this facility would be processed as in the past in the grievance procedure, except that no grievances would be processed to arbitration. The letter revealed that Respondent BEP's position was identical concerning the Grandview facility except that the arbitration procedures would be extended and that therefore the Union would be expected to agree to extend the no-strike provisions. However, Haer testified without contradiction that the Locals did not agree to the extension of the no-strike clause. Thus, effective January 23, the contracts at the Duke and Grandview facilities terminated.

Haer received another letter from St. Cyr, this one dated April 21. The letter is referenced "Disciplinary Policy—Effective June 1, 1995." The letter advised Haer that Respondents "have modified and standardized their disciplinary policies" at the union-represented facilities in accordance with a six-page attachment. The letter continued, "These changes will become effective June 1, 1995, and will remain in effect until such time as management determines that further changes are necessary." The attachment to the letter describes the disciplinary rules applicable to employees. It cautions that employees who fail to follow the rules will be subject to discipline up to, and including, discharge. The attachment describes the procedure to be followed in issuing discipline and the steps involved in investigating alleged violations of the rules. The rules are divided into category one violations which may lead to discharge; 26 rules are specified, and category two violations for which progressive discipline may be appropriate; 23 rules are specified. This was the first that the Union was told of changes in disciplinary policy.

A negotiating session was held on April 27. At that meeting Haer asked the purpose of the institution of the new disciplinary rules. St. Cyr replied that it was a policy promulgated out of headquarters in Fort Smith, Arkansas. Haer asked if the policy was being implemented for all the nursing homes, and St. Cyr replied that the policy was being implemented for all the nursing homes in the region. Haer said that the Union considered the new policy to be a change, and he demanded bargaining. Haer also made several requests for information, including a copy of the then-existing disciplinary policy. At that meeting Haer was given a copy of the existing policy. That policy divided misconduct into minor violations for which progressive discipline may be appropriate; 15 rules were specified, and major violations which may lead to discharge; 19 rules were specified.

On May 18, Haer sent a letter to St. Cyr wherein he stated that it was the position of the Union that Respondents could not unilaterally modify work rules at union-represented facilities. He asserted that the new work rules may be unlawful and in violation of the collective-bargaining agreement. The letter requested a considerable amount of information concerning the disciplinary policy.[12] St. Cyr responded by letter dated May 23. In that letter he stated, "Under our agreements, the substance of the disciplinary rules codes of conduct are at the discretion of management. Only disciplinary procedures (grievance-arbitration) have been the subject of negotiation and contract. This is affirmed by the management's rights clause, the zipper clause, past practice, and usual practices of collective bargaining." The letter also disagreed with Union's characterization of the disciplinary policy as

[12] There is no allegation that Respondents have unlawfully refused to provide information to the Locals.

"work rules."[13] In a letter dated June 8, Haer repeated his request to bargain over the proposed disciplinary policy; by letter dated June 23, St. Cyr responded, "Where your request to bargain over the facilities standardized rules of employee conduct and discipline are concerned, I addressed that issue in my letter to you of May 23, 1995 and my position remains unchanged."

The next bargaining session was held July 24. Haer asked if the new disciplinary policy had been implemented, and St. Cyr indicated that it had. Haer reiterated the Union's request to bargain over the disciplinary policy. St. Cyr replied that Respondents were not obligated to bargain about that matter. St. Cyr explained that the policy was not new since it had always been expected that employees act in a manner consistent with the disciplinary policy. Also present for Respondents was Donald Dotson, senior vice president. On August 7 another bargaining session was held. At that session Haer brought up the situation of employee Jane Say who, he asserted, had been suspended under the new disciplinary policy; Say had allegedly been disciplined for giving false information about other employees.[14] Haer said that this was one of the reasons why the Union wanted to bargain over the matter. Dotson reiterated that Respondents did not have to, and would not, bargain about the disciplinary policy. Dotson said that Respondents would listen to the Union if it had concerns, but Respondents would not bargain. Haer then questioned how Respondents could distinguish between a false statement for which an employee could be disciplined and an honest misunderstanding. Dotson replied that those issues are resolved in the grievance procedure.[15]

Thus, the evidence shows that on June 1, Respondents implemented a revised disciplinary policy for its employees, including those represented by Locals 585 and 668, in an effort to standardize those rules for all employees. The evidence shows that the new disciplinary policy substantially altered the old rules; indeed St. Cyr, in his letter dated June 21 to the Union, admitted that the disciplinary policy would be "modified." In any event, a comparison of the old policy with the new policy clearly shows substantial modifications.

The General Counsel contends that the implementation of the disciplinary policy violated Section 8(a)(5) of the Act, but only for unit employees at the Duke and Grandview facilities. It is axiomatic that an employer may not unilaterally change terms and conditions of employment for employees represented by a labor organization. *NLRB v. Katz,* 369 U.S. 736 (1962). It is also well settled that disciplinary rules constitute significant terms and conditions of employment over which an employer has an obligation to bargain. *Great Western Produce,* 299 NLRB 1004 (1990). I have concluded above that the Unions on several occasions requested to bargain concerning the changes that Respondents were intending to implement concerning the disciplinary rules, and that the changes were significant and substantial in nature. I have further concluded that Respondents refused to bargain with the Unions on this subject before they implemented the revised disciplinary policy. It follows that Respondents thereby violated Section 8(a)(5) and (1) of the Act.

Respondents raise three defenses to their conduct in this regard. First, Respondents argue that the management-rights provision language gave it the right to implement disciplinary rules without first bargaining with the Union.[16] The difficulty with this contention is that I have concluded that the contracts covering the unit employees at these two facilities had expired by the time Respondents implemented the revised disciplinary policy.[17] The management-rights provision language amounted to a waiver by the Unions of their right to bargain on this subject during the term of the contract. When the contract expired, so did the Unions' waiver. *Buck Creek Coal*, 310 NLRB 1240 (1993); *Holiday Inn of Victorville,* 284 NLRB 916 (1987). This argument lacks merit.

Next, Respondents argue that they did in fact satisfy their obligation to bargain. They correctly point out that preimplementation notice was given to the Union and that Respondents supplied the Union with extensive information on this matter that the Union had requested. However, as found above, Respondents consistently refused to bargain over this subject, taking instead the position that they did not have to so by virtue of the management-rights provision language in the expired contracts. The fact that Respondents gave notice and supplied information does not satisfy the obligation to engage in meaningful, preimplementation bargaining with the collective-bargaining representative of their employees. Respondents also argue that the testimony of Dotson establishes that Respondents engaged in post implementation bargaining on the disciplinary rules. In response to this argument I point out first that Dotson's testimony, taken as a whole does not support Respondents' contention. Instead, it is clear that Dotson's position at meetings with the Union was consistent with St. Cyr's written and oral position—that Respondents had no obligation to bargain by virtue of the management-rights provision language.[18] Thus, this argument is also without merit.

Lastly, Respondents argue that the disciplinary policy revisions were applicable companywide, to union represented as well as nonrepresented employees. However, it is axiomatic that this, standing alone, does not excuse a refusal to bargain. Respondents presented no evidence as to why the disciplinary rules could not be tailored to suit the needs and desires of the

[13] The record shows that Thomas DeBruin, president of district 1199P, SEIU, sent a similar letter to St. Cyr on May 19; he received an identical response.

[14] This matter is discussed in greater detail below.

[15] These facts are based on a composite of credited portions of the testimony of Haer and Dotson. The testimony of both witnesses shows that Respondents took the position that they did not have to bargain concerning the substance of the disciplinary policy. This is consistent with the documentary evidence.

[16] The General Counsel agrees that the language in the contracts gives Respondents the right to unilaterally issue disciplinary rules; this explains why the General Counsel is not contending that Respondents conduct at other facilities that were covered by an existing collective-bargaining agreement violated the Act.

[17] Respondent may not even make this contention concerning the LPN unit; there never has been a contract, much less a management-rights provision, covering these unit employees.

[18] If I were to read Dotson's testimony in the way Respondents argue it should be understood, I would discredit it since it is inconsistent with Respondents' own documentary evidence and the otherwise credible evidence in the record.

unit employees. I conclude that by unilaterally implementing revised disciplinary rules on June 1 for unit employees at the Grandview and Duke facilities, Respondents violated Section 8(a)(5) and (1) of the Act.[19]

D. The Facially Invalid Rules Allegation

The General Counsel contends that two of the rules contained in the disciplinary policy which Respondents implemented independently violate Section 8(a)(1) of the Act.

Rule 1.4 provides: "Refusing to cooperate in the investigation of any allegation of patient (resident) neglect or abuse or any other alleged violation of company rules, laws, or government regulations." This rule was promulgated and maintained in each of the 20 facilities listed in the complaint.

Rule 1.6 provides: "Making false or misleading work-related statements concerning the company, the facility, or fellow associates." The disciplinary policy classifies violations of these rules as a category one violation, meaning that employees are subject to discharge for violating them. This rule was promulgated and maintained in 19 of the 20 facilities listed in the complaint.[20]

As to rule 1.4, the General Counsel argues that the Board has recognized that an employer may compel an employee to provide information concerning matters that the employer is investigating before any final discipline has been issued, citing *New Jersey Bell Telephone Co.,* 308 NLRB 277 (1992); *Manville Forest Products,* 269 NLRB 390 (1984); *Cook Paint & Varnish Co.,* 246 NLRB 646 (1979), enf. denied 648 F.2d 712 (D.C. Cir. 1981). However, since this rule is not confined to matters "still in the investigative stage" or where "no final disciplinary action has been taken" the General Counsel argues that the rule may reasonably lead employees to believe that they are required to provide information even after Respondents have issued discipline.

As to rule 1.6, the General Counsel argues that it infringes on an employee's Section 7 right to discuss union and other protected, concerted matters relating to working conditions with other employees by permitting Respondents to discipline employees for making statements that are "merely false" as opposed to "malicious," citing *Linn v. Plant Guard Local 114*, 383 U.S. 53 (1966); *Southern Maryland Hospital,* 293 NLRB 1209 (1989); *Radisson Muehlebach Hotel,* 273 NLRB 1464 (1985); *Stanley Furniture Co.,* 271 NLRB 703 (1984); *American Cast Iron Pipe Co.,* 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979).

Respondents argue that rule 1.4 requires employees to cooperate in investigations and rule 1.6 requires that they tell the truth, and that this is no more than what Respondents have a right to expect from employees. Respondents point out that nursing care facilities involve the provision of services in circumstances that are sometimes emergency or near emergency situations and that these institutions are heavily regulated. These institutions must have the ability to perform prompt investigations based on reliable information; otherwise the essential mission of the nursing home could be compromised. For these reasons Respondents argue that it is essential that employees cooperate in investigations and tell the truth.

Regarding rule 1.4, the Board held in *Cook Paint & Varnish,* supra, that an employer may not compel its employees to answer questions asked by the employer's counsel relating to a pending grievance which was scheduled for arbitration. The Board differentiated between a situation where an employer's inquiry was still in the investigative stage and no final discipline had yet been meted out and the situation where an employee had already been disciplined and the employer was in the process of defending or justifying its conduct. In the former situation the Board noted that it had held that employers did have the right to compel employees to cooperate with an investigation; in the latter situation the Board concluded it was unlawful for the employer to do so. The Board explained that in the latter case, "when an employer seeks to question its employees, it moves into the arena of seeking to vindicate its disciplinary decision and of discovering the union's arbitration position, [footnote omitted] and moves away from the legitimate concern of maintaining an orderly business operation." *Cook Paint & Varnish,* supra at 646. In such a situation there may be pressures, sometimes subtle, sometimes not, placed on the employee to conform the facts to support the employer's case. The Board concludes that the employee's Section 7 right to make common cause with other employees by resisting an employer's efforts to build its case against the disciplined employee predominates.[21] Thus, the holding of *Cook Paint & Varnish* may be summarized by stating that employees have a Section 7 right to support a fellow employee by refusing to cooperate with an employer in building its case against the employee in an impending arbitration proceeding. The Board's holding in this regard is not unlike that in *Johnnie's Poultry Co.,* 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). That case arose in a context of an employer's preparation for a Board unfair labor practice hearing. The Board there held, inter alia, that an employer violates Section 8(a)(1) of the Act if it compels an employee to answer questions concerning employees' protected union activity during the employer's pretrial preparation process. The Board made clear that such questioning could only occur if the employee voluntarily agreed to cooperate with the employer's preparation. In other words, the employee had a Section 7 right to refuse to cooperate.[22]

[19] At the hearing Respondents adduced some testimony, conclusory in nature, that the modifications in the disciplinary policy were of a type that employees would always have been expected to follow. No specific evidence was presented to support this argument, and it is not made in the briefs filed by Respondents.

[20] The evidence shows that rule 1.6 maintained at the Caledonia Manor facility differed significantly from the rule maintained at the other facilities. This situation is described in more detail below.

[21] Although that decision was denied enforcement by the D.C. Circuit Court of Appeals, the Board has given no indication that I am aware of that it has overruled its holding. The decision remains binding on the Board's administrative law judges.

[22] It is interesting to note that the Board did not mention the *Johnnie's Poultry* test in *Cook Paint & Varnish.* Application of that well established test to the facts in *Cook Paint & Varnish* may not have changed the conclusion the Board reached but it may have allayed the concerns expressed by the court of appeals concerning per se nature of the Board's holding.

Having identified the Section 7 rights raised by this allegation, I examine rule 1.4 to determine whether an employee reading that rule in a common sense manner would reasonably conclude that he or she would incur discipline if he or she exercised the identified Section 7 rights. The rule provides in pertinent part: "Refusing to cooperate in the investigation of any . . . alleged violation of company rules, laws, or government regulations." It appears that the plain language of the rule would apply to prearbitration and preunfair labor practice trial preparation situations where employees cannot be compelled to cooperate. Although the Board in *Cook Paint & Varnish* used language indicating that an "investigation" applied only to the predisciplinary phase of grievance processing, it seems that an employee would reasonably conclude that that word could include all phases of the prearbitration process, including witness preparation for the arbitration hearing. Although, as the Board indicated, the nature of the investigation turns more adversial in nature as the arbitration hearing approaches, it nonetheless continues to be an "investigation" to determine whether the conduct challenged by the grievance was in conformance with "company rules, laws, or government regulations."

Respondents' argument that all this rule requires is that employees cooperate with an investigation only serves to make the General Counsel's case, because, as set forth above, the Board has held that an employer cannot coerce cooperation in certain circumstances. The argument that Respondents need this rule to maintain the highly regulated standards set for nursing homes is too broad an argument to be persuasive. Respondents are free to require cooperation in investigations in a wide range of areas not challenged in this case. The difficulty with the rule is that it is so expansively written that it intrudes upon certain specifically defined rights of Respondents' employees. I conclude that rule 1.4 is overbroad to the extent that prohibits employees from freely exercising the rights described above and therefore violates Section 8(a)(1) of the Act.

Regarding rule 1.6, the Board has consistently held that such rules are unlawful since they restrict not only recklessly or maliciously false speech, but also speech asserted in good faith which subsequently may turn out to be false. This restriction serves to stifle employees in discussions otherwise protected by Section 7 of the Act concerning union matters and other terms and conditions of employment; they may become hesitant to voice their views and complaints concerning working conditions for fear that later they may be disciplined because someone may determine that those statements were false. The impact such a rule has is vividly shown in the discipline of Say, who, as I conclude below, was unlawfully disciplined relying on this rule. The cases cited above by the General Counsel show that this policy has been applied to a wide range of enterprises, including health care institutions such as are operated by Respondents. Accordingly, I conclude that by maintaining this rule, Respondents violated Section 8(a)(1) of the Act.

E. The Revision of Work Schedules Allegation

The General Counsel alleges that Respondent BEP reduced the working hours and modified the work schedules of the service and maintenance employees at the Grandview facility in violation of Section 8(a)(5). On May 5, then Local 585 president Gloria Culp was summoned to a meeting at the Grandview facility. Among those present at the meeting were Tamara Montel, Respondent BEP's administrator at the facility, Culp, and Larry Winger, an employee and union steward at that time. Montel explained that the nurse's aides were going to have their work schedules reduced by increments of whole days and that dietary, housekeeping, and laundry department employees would have their schedules reduced by amounts ranging from one-half hour to several hours per day. Montel further explained that reductions were necessary due to a decline in the number residents at the facility. The details of the reductions were explained on a individual employee basis. Culp said that the facility was properly using seniority to effectuate the reductions, however, the decision to make the reductions had not been negotiated with the Union and therefore the Union did not agree with them. Montell did not respond.[23]

On May 10, Haer received copies of several documents from Montel. Those documents were all dated May 5 and were addressed to employees at the facility; the documents were entitled "Reduction in Hours." These were form memoranda which stated, "This is to advise you that because of reduced census and the need to reduce hours, your schedule is being reduced. Effective May 25, 1995 your hours will be reduced by [various amounts] per day. If you are unable to work a reduced schedule we will have to lay you off until such time as our census increases." The memoranda advised employees of their bumping rights and requested that the employee contact Montell by 10 a.m. on May 10 to advise her of the employee's decision. Fourteen employees were advised that their schedules were reduced 15 minutes per day; 18 employees were advised that their schedules were reduced 30 minutes per day. In addition, Haer received similar forms advising four employees that they were being laid off for the same reasons. These memoranda provided the employees with information concerning unused vacation and health insurance. Finally, Haer also received similar forms sent to 12 employees advising them that their work schedules had been cut. The reductions ranged from 1 day per payroll period (from 8 to 7 days) to 6 days per payroll period (from 8 to 2 days).

On May 12, Haer sent Montell a letter on behalf of the Union demanding bargaining concerning the reductions. In the letter the Union advised Respondent BEP that it felt that the reductions were not necessary and that Respondent BEP was already understaffed and that the Union considered the reductions to be layoffs governed by specific portions of the expired contract. In that regard, the Union asserted that under those provisions layoffs were to begin with the reduction of hours of the least senior employees. The letter concluded by requesting that Montell contact the Union immediately to schedule a bargaining meeting. Respondent BEP did not answer this letter. Toward the end of May, Haer called Montel by telephone. He expressed concerns that employees had made to him about the reductions and he asked for a response to his letter requesting bargaining. Montel said she would get back to him after she spoke with St. Cyr, however, she never did so. As indicated

[23] These facts are based on the testimony of Culp, who I conclude is a credible witness.

above, on June 8 Haer sent St. Cyr a letter which in part concerned the disciplinary policy. In that letter Haer also pointed out that he never received a response to his May 12 letter despite the telephone call that he had made to Montell. Haer complained, "If you are not aware, let me tell you that arbitrary and capricious schedule changes have created chaos at Grandview. I'm told that employees are laid off or cut back in hours one day, then mandated to work overtime the next day. This preposterous situation must be the result of either completely incompetent management or a calculated plan to create an atmosphere of discord and disintegration. Either way, there is a serious problem for the residents and workers of Grandview." As also indicated above, St. Cyr replied by letter dated June 23. In that letter St. Cyr responded to the reduction in work schedule issue as follows: "The subject reductions were necessitated by falling census and a need to operate within good business practices as provided for under the Management Rights clause of the CBA, a clause which remains effective during periods when no contract extensions exist. In determining the method by which employees' hours were reduced at Grandview, the company has extended the use of the grievance and arbitration procedures and if the union believes the facility has violated the CBA in areas where the 'status quo' has application, it may pursue that avenue of recourse."

On July 10, the Haer and St. Cyr were present at a grievance meeting. At the meeting, Haer repeated his request for bargaining on the subject; he advised St. Cyr that the Union had filed an unfair labor practice charge with the Board. Haer asserted that many of the grievances they had discussed resulted from the modifications that Respondent BEP had implemented. St. Cyr asserted that Respondent BEP had been able to restore many of the hours that had been cut. Haer nonetheless continued to request bargaining. St. Cyr said that Respondent BEP did not have to bargain over the matter because it had discussed the procedure it used for the reduction with Union Stewards Culp and Wringer, and they concurred. As to the decision to reduce hours and schedules, St. Cyr said that it was a management prerogative and management had no duty to bargain over that decision.[24] Although, as indicated above, Culp and Winger had agreed to the procedures Respondent BEP used in effectuating the reduction, no bargaining ever occurred concerning the decision by Respondent BEP to reduce employees' hours and schedules.

An employer is generally not free to unilaterally alter terms and conditions of employment of employees represented by a labor organization. *NLRB v. Katz,* supra. It is also clear that reduction of hours worked by employees is a mandatory subject of bargaining. *Sheraton Hotel Waterbury,* 312 NLRB 304 (1993). I have concluded above that Respondent BEP reduced the hours of unit employees, and that it did so without first giving the Union an opportunity to bargain over that decision.[25] I further note that the reason for the reduction was a reduction in census; in other words, a decline in business. This does not establish that the reduction in hours was due to a basic change in the direction or scope of the business that might serve to privilege Respondent BEP's conduct from the bargaining process. Further, the changes made were substantial and did not constitute the normal day-to-day schedule alterations that might not trigger an obligation to bargain. *Angelica Healthcare Services Group,* 284 NLRB 844, 853 (1987).

Respondent BEP argues that the management-rights provision in the expired contract permitted it to unilaterally engage in this conduct. However, even assuming that this was the case, that contract had expired and, for reasons already explained above, the Union's waiver of its right to engage in bargaining on this matter expired with the contract. Also, Respondent BEP's argument that the reduction in hours it effectuated applied to nonunit as well as unit employees does not excuse it from its obligation to bargain with the Union concerning unit employees. Accordingly, I conclude that by reducing the hours of unit employees on about May 5, without first giving the Union an opportunity to bargain about that decision, Respondent BEP violated Section 8(a)(5) and (1) of the Act.

F. The Change in LPN Job Description Allegation

The General Counsel alleges that in June, Respondent BEP implemented a new policy regarding licensed practical nurses' duties and job descriptions in violation of Section 8(a)(5) and (1). Susan Carbaugh had worked for Respondent BEP for about 13 years at the time of the hearing; she is an LPN. For almost all of that time she worked "on the floor" performing typical LPN duties. At the time she started her employment she was not given a job description; she received her training concerning her duties from another LPN. Sometime in 1992 she saw a job description for the LPN position on a desk; however, no one ever gave her a copy to sign.

In June 1995, Carbaugh was given a copy of a job description for the LPN position and a "notice to associates" by Michelle Lockhart, infection control supervisor. Lockhart asked Carbaugh to read the documents, sign them, and return them. Carbaugh did so. The documents that were given to Carbaugh were dated June 15 and described the LPNs as "supervisors."[26] However, the documents did not accurately describe the duties of the LPNs as they were actually performed. For example, the LPNs did not assign work to the nursing assistants or adjust their grievances; that was performed by Supervisor Theresa Stack. The LPNs did not evaluate new associates or play any role in determining whether they worked beyond their probationary periods. The LPNs did not have any responsibility for making recommendations concerning annual performance evaluations of certified nursing assistants. The LPNs did not directly issue discipline; instead, they brought the matter to the attention of Supervisor Stack, who then handled the matter from there. These are only some of the many ways that the job descriptions as written did not reflect the reality of the work

[24] This is consistent with a written summary of the meeting sent by St. Cyr to the Union.

[25] I have further concluded that Respondent BEP did give the Union an opportunity to bargain concerning the procedures to be used in effectuating the reduction of hours and that the Union agreed that the procedures were proper. Thus, the finding above is limited to the decision to reduce hours.

[26] At this time Respondent BEP was in the process of contesting the Board's certification of Local 585 as the collective-bargaining representative of a unit of LPNs; Respondent BEP argued that the LPNs were supervisors.

performed by the LPNs.[27] Since the introduction of the job descriptions, LPNs have been required to fill out evaluations for certified nursing assistants, but otherwise the actual duties of the LPNs have continued as before.[28]

In June, Linda Marie Wambaugh, then organizing director for Local 585, met with the LPNs. The employees reported to her that Respondent BEP had issued new job descriptions and had required them to sign the job description in order to receive their paychecks and that this was the first time that Wambaugh had learned that new job descriptions had been issue. Wambaugh did not request bargaining on the matter since Respondent BEP was refusing to bargain in order to test the Board's certification in the underlying representation case.

As described above, the Union was certified to represent a unit of LPNs but Respondent BEP is in the process of testing that certification in the Court of Appeals, arguing that the LPNs are supervisors. The Board's findings supporting that certification are binding on me under the circumstances of this case. *Southwestern Bell Telephone Co.,* 235 NLRB 963 (1978). Also, Respondent BEP in not excused from its bargaining obligation while it pursues an appeal; instead, it acts as its peril if it makes in unilateral changes during the pendency of the appeal. *Allstate Insurance Co.,* 234 NLRB 193 (1978). I have found above that Respondent BEP presented the unit employees with job descriptions that varied substantially from the duties they had performed in the past and from the duties that had been described in an earlier job description by assigning them supervisory duties. I have further found that notwithstanding the substantial changes in the job descriptions, the actual duties of the LPNs have changed only in that they now do written evaluations of certified nursing assistants. The General Counsel argues that these facts show that Respondent's conduct is a transparent, but unlawful, attempt to buttress its appeal now pending before the court of appeals. Unilaterally issuing new job descriptions to union-represented employees violates Section 8(a)(5) of the Act. *Dickerson-Chapman, Inc.,* 313 NLRB 907, 942 (1994). This is so even though Respondent BEP has not yet required the unit employees to perform the full range of additional duties, since the very assignment of those duties and responsibilities on employees affects terms and conditions of employment. Unilaterally assigning new job duties to union represented employees also violates Section 8(a)(5). *Woods Schools,* 270 NLRB 171, 176 (1984). Moreover, in light of Respondent BEP's clear refusal to recognize the Union while it tests the Board's certification, any request by the Union to bargain on this subject would have been futile. I therefore conclude that by issuing new job descriptions and changing job duties for the LPNs without bargaining with the Union, Respondent BEP violated Section 8(a)(5) and (1) of the Act.

G. The 8(a)(3) Allegations

1. Oneita Say

The General Counsel alleges that Respondent BEP suspended employee Oneita Say for 2 weeks in violation of Section 8(a)(3) and (1). Say began working at the Grandview facility in 1992; she worked as a nursing assistant. Say ended her employment there in 1995 after she had a work injury that resulted in workers' compensation proceeding. When last employed at the facility, Say worked the 11 p.m. to 7 a.m. shift where she was supervised by Donna Puleo. In her last written appraisal for the year ending April 30, 1993, Say received an overall rating of "very good."

In the fall of 1993, Say became a union steward at the facility. The following year Tamara Montell became the administrator at the facility. Montell took the local union officials to lunch as part of introducing herself to the staff. During the luncheon Montell said that she had not worked with unions before and that she hoped that she and the local union officials would be able to resolve grievances quickly and informally. She also said that she had an "open door" policy and that they should feel free to come in and discuss concerns with her. When one of the luncheon attendees questioned whether there would be any repercussions or breaches of confidentiality if this process was used, Montel assured them there would be complete confidentiality and no repercussions.

About a year later, in July, Say and Gloria Culp, then president of Local 585, visited Montel in her office. The purpose of the meeting was to discuss problems that employees had raised with Say. During the meeting Say and Culp complained that Supervisor Puleo was not properly rotating the employees to work in the more difficult wings of the nursing home; that Puleo was showing favoritism in the way she assigned work. Montell responded that she found that hard to believe. Say then said that there were other problems with Puleo as well. Say asserted that Puleo had left the facility while on duty to go home and change clothes. Say also claimed that the residents of the facility were not getting proper care because the employees were overworked and unable to complete all their assigned tasks. Montell said she would investigate the matters and would get back to Say and Culp.

The next day, August 3, Say was approached by Puleo while at work. Puleo, who usually addressed Say by her middle name Jane, on this occasion addressed her as "Say" and said that she wanted Say to take the vital signs of the residents in a timely fashion. Say replied that she always turns in those reports when she is supposed to "to the best way that I can." Say left and started to prepare to perform her work. Puleo then said that she wanted to talk with Say; she asked why Say had told all those lies in the office with Montell. Say denied that she did that, but Puleo insisted that she had. After another denial the discussion became louder and more heated. Puleo insisted that Say had told Montell that "none of the workers on the eleven to seven done their jobs." Say again denied this, asserting that it

[27] In many of these same ways the new description varied from the one that Carbaugh saw on a desk in 1992. In light of the clear differences between the two written job descriptions, the testimony of Wambaugh, former organizing director for Local 585, that LPNs had been asked to sign the same job description that had been in effect at the time of the Union's certification is clearly erroneous.

[28] These facts are based on the testimony of Carbaugh, who, as noted, is a long-term employee still employed by Respondent BEP. I find her testimony to be fully credible. In addition, Respondents stipulated at the hearing that the testimony of Beverly Higbee would corroborate that given by Carbaugh concerning the duties of the LPNs and the differences between those duties and the duties described in the new job descriptions issued June 15.

was all wrong. Puleo asked why Say had not come to her with the problems, and Say said that the problems had been ongoing for a long time. Say said she had a lot of work and had to get started. As Say walked away Puleo followed her and continued to discuss the matter. Say protested that she did not want to discuss the matter, that she was falling behind in her work, and that she was becoming upset. But Puleo persisted; she insisted on knowing why Say had not come to her first and instead brought the matters to Montell. Say began to shake; she began crying; as she described it, "I was a total wreck." Puleo instructed Say to go to the nurses' station since residents were being disturbed by their discussion. Once at the nurses' station Puleo resumed her questioning of Say. At one point Say said, "I want you to understand something: I am a union steward. I have a job. It's to represent these people when they come to me with a problem. And I was asked to have something done about this, file a grievance or do something about this situation, and that's exactly what I was doing, taking care of complaints and problems of my coworkers on the eleven to seven shift." Later during the shift Puleo told Say to be sure that certain work was on Puleo's desk by 4 o'clock because Puleo was tired of the work always being late. Then Puleo told Say not to leave other work for someone else because Puleo "was tired of [Say] busting [her] ass to get out that door at seven o'clock." Say protested that her timecard would show that she very seldom left the facility before 7:15 or 7:30 a.m.

At another point during the shift Puleo said that she wanted to prove something to Say. Puleo assembled all the employees on the floor and told them that Say had gone to the office and told Montell that none of them did their work. Puleo asked the employees if that was true, that they did not provide care for the residents. Say again protested, "I did not say that. That wasn't the way it was." Say walked away. She was so distraught that when she went to pick up a box of gloves, she dropped the box, and when she went to pick it up again, she dropped it again. Say then told another employee that she had to go home, that "I am shaking so bad, I can't even think what I'm doing here. I can't even do my work." She then told Puleo essentially the same thing. Puleo then asked to talk with Say again; she offered to help Say with her work so she could catch up, and she advised Say that it would not be in her best interest to leave. Say sat down and had a glass of water, but Puleo resumed her repetitive questioning. Say nonetheless worked her entire shift.[29]

That morning, August 4, Montell received a written version of the events that occurred during the preceding shift from Puleo.[30] In that document Puleo asserted that Say had shaken her finger in Puleo's face and said in a loud voice that she had no respect for Puleo as a nurse. According to Puleo's written description, she asked Say to keep her voice down, that the patients were sleeping, but Say continued to loudly assert that Puleo knew that employees were not doing a complete ‚job. Puleo's written version accused Say of making false or misleading work related statements by asserting that employees did not actually make their rounds with the residents and that Say was guilty of "Resident neglect" when she admitted that she did the same and was guilty of failure to report the foregoing to management. Finally, Puleo's written version asserted that Say had been guilty of insubordination when Say slammed some items down on the desk, pointed her finger at Puleo, and said that she was going home and was going to call Montell.

When Say arrived home that morning she received a call for Angela Huffman, director of nursing. Huffman requested that Say come into the office. Say asked if it involved discipline; Huffman replied that they only wanted to talk to her. Say responded that she would let Huffman know if she would be able to come in. Say then managed to get in touch with Culp, who met Say in the parking lot outside the facility. After advising Culp of the events of the last day, Say went with Culp to Huffman's office where Montell was also present. At the meeting Say was given an "Associate Memorandum." That document revealed that Say was being suspended beginning August 4 for a "Category I Violation." Specifically, it indicated that Say had violated sections 1.6 and 1.21[31] by "Making false or misleading work-related statements concerning the facility or fellow associates/Insubordination." In the portion of the document entitled "Supervisor's Comments" it states, "On the 11 to 7 shift 8/3/95 am 8/4/95 Associate stated in a harsh tone to RN supervisor that she [had] no respect for her as an RN and further stated that no one ever gets changed on first rounds on this shift (11–7)—implying fellow associates don't do their job." This document was read to Say at the meeting and she was told that she was suspended pending further investigation. Culp responded that the Union did not agree with the suspension because the new disciplinary policies that had been put in effect had not been first negotiated with the Union. Culp pointed out that they had earlier assured Say that no discipline would occur at this meeting, yet they in fact disciplined Say. Culp said that they lied and made false statements.[32] At some unspecified point Say was provided an opportunity to submit a written statement concerning the incident to Respondent BEP, but she declined to do so.

Thereafter, an investigation was conducted by Angela Huffman, director of nursing at the Grandview facility. During the course of the investigation statements were provided by various

[29] Counsel for the General Counsel stated at the hearing that she was not alleging that any of the conduct described above independently violated the Act. Accordingly, I make no findings in that regard.

[30] That document, as well as other written statements concerning these events, are clearly hearsay and, thus, were not received into evidence for the truth of the matters asserted therein concerning these events. Instead, they were received into evidence solely for the purpose of showing what Respondent BEP relied on in disciplining Say.

[31] Sec. 1.6, dealing with false or misleading statements, has been described more fully above. Sec. 1.21 is "Insubordination."

[32] The foregoing facts are based on testimony of Say and Culp, both of whom I found to be credible witnesses. Puleo did not testify at the hearing. Montell testified in summary fashion concerning the meeting with Say and Culp; her testimony does not conflict in any material manner from the facts found above. Huffman also testified, but she was able to recall very little in terms of detailed, credible facts. As more fully described elsewhere in this decision, although various written statements were received into evidence concerning these events, they were not received for the truth of the matters asserted in the statements and, thus, cannot serve to contradict the direct testimony given by Say and Culp.

persons concerning the events that led to Say's discipline.[33] A statement from Patricia McDevitt, registered nurse, is dated August 10. In that statement McDevitt relates the following. On August 3 she heard Puleo ask Say why Say had failed to perform a certain task and Say's voice escalated in responding. Puleo said that the hallway was not the place for that discussion. Shortly thereafter, McDevitt heard Say say that she was leaving but was going to call Montell first. Puleo told her to wait; that she wanted Say to tell the other employees what she had said earlier. Puleo then assembled the employees and asked Say whether she had said that the employees did not check the residents while making their first round. Say admitted that she had said that. Several employees disagreed with Say's assertion. After questioning by Puleo, Say admitted that she also did not check the residents and that she failed to report other employees who she claimed had failed to do so. McDevitt noted that at one point she observed Say shaking her finger at Puleo, but she could not hear what was being said. Kimberly Rodgers, certified nursing assistant, also submitted a statement dated August 10. Rodgers' written description of the events of August 3 follows. She heard Puleo explain to Say that Say should have answered a bell that was ringing from a resident and changed the resident instead of walking by. Say responded by practically shaking her finger in Puleo's face and saying in a loud voice that no employees change residents during their first rounds and that she had no respect for Puleo. Rodgers then claims that she interjected and said that she does do her work and changes the residents when necessary; Say and Rodgers began arguing with Say speaking loudly. Say then slammed a thermometer down on a bedside stand and said that she was not going to work; she was going to call Montell. Later, Rodgers was called to a meeting by Puleo at which Say repeated her claim that employees did not change residents during their first rounds. Douglas Erdley, licensed practical nurse, also submitted a written statement dated August 10. In that statement Erdley asserts that he heard Puleo giving Say very specific instructions concerning Say's responsibilities. Say seemed to feel that she would be unable to do all of her work if she was to do the work as described by Puleo and that she did not need to do the work assigned by Puleo. Later, Say made the now familiar remarks concerning going home and calling Montell and the meeting with employees followed. Mary McBride, certified nursing assistant, submitted a brief written statement dated August 11. McBride writes that she was called into a meeting by Puleo where Say denied having said that she was the only person changed beds on the first rounds. Lastly, Rita Sabousky, certified nursing assistant, submitted a written statement dated August 9. She writes that she was called to a meeting where Say claimed that the employees were not doing their jobs; that Say was upset because she had to take vital signs and made a big scene. The document contains other assertions not adequately explained in the record to understand with certainty.

Neither Montell nor Huffmann spoke directly to the employees who provided the statements concerning the events described therein. Nor were Montell nor Huffman aware of the circumstances under which the statements were given. It is therefore unclear, for example, whether Puleo played any role in taking these statements. In any event, Montell concluded from the statements that the allegations against Say had been substantiated but that Say would be given an opportunity to improve her work attitude after serving a 2-week suspension.

About 2 weeks later Say was notified that she could return to work. Instead of returning to work, Say applied for and received stress-related leave, and thereafter, as indicated above, was involved in a workers' compensation proceeding. In settlement of that proceeding, Say signed a document dated January 23, 1996, which included the following: "The employee has voluntarily resigned from her employment with the employer effective January 23, 1996 for reasons other than her work-related injury. In lieu of employee resigning, she voluntarily agrees to withdraw N.L.R.B. Complaint [sic]." At no time had Say ever filed a charge herself concerning her suspension.

I begin the analysis of this allegation by pointing out that Say was engaged in protected union activity when, as union steward, she and Culp visited Montell and complained on behalf of employees about Supervisor Puleo and their perception that employees were so overworked that they were unable to complete their assigned tasks. I further conclude that Say's encounter with Puleo the next day was a continuation of that protected union activity. Although the discussion took place on the work floor, it was Puleo who chose to engage in the discussion with Say at that time and location. Moreover, it was clear that Puleo had learned of the discussion Say had earlier with Montell since Puleo directly indicated as much to Say during their discussions. During the discussion Say continued to defend the position she and Culp had taken in their conversation with Montell. As union steward, she clearly was entitled to do so.

It was Puleo who continued to press the matter in a manner obviously designed to anger and upset Say. Puleo was quite upset with what Say had told Montell but, as indicated, Say's comments were protected under the Act. Nothing that Say said or did during the discussions she had with Montell or Puleo was so outrageous or inappropriate that it would deprive Say of the protection of the Act. *Caterpillar, Inc.,* 321 NLRB 1178 (1996). The evidence clearly shows that Say was disciplined because of the manner and content of her encounter with Puleo, an encounter which was protected union activity. It follows that this discipline violated Section 8(a)(1) of the Act. *Mast Advertising & Publishing,* 304 NLRB 819 (1991).[34]

The General Counsel argues that under the analysis set forth in *Wright Line*[35] should be applied in this situation. I find that analysis inappropriate in these circumstances because I have concluded that the conduct for which Say was disciplined was protected union activity. *Neff-Perkins Co.,* 315 NLRB 1229 fn. 2 (1994). Respondent BEP appeared to argue at the hearing that Say signed a release that waived her right to any further

[33] None of the employees who provided statements testified at the hearing in this case. Again, these statements also were received only to show what was relied on in reaching the decision to discipline Say.

[34] It is unnecessary to determine whether this conduct also violated Sec. 8(a)(3). Id. at 820 fn. 7.

[35] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

relief, based on the document quoted above; no such argument is made in Respondent BEP's brief. I conclude that the quoted language is too ambiguous to constitute a clear and knowledgeable waiver.

2. Robert Reed

The General Counsel contends that employee Robert Reed was suspended for 3 days by Respondent BEP in violation of Section 8(a)(3) and (1). Reed began working at the Grandview facility in November 1994; at the time of the hearing he was employed as a housekeeper. He served as a member of the Local 585's bargaining team for the contract that was negotiated in 1992. In 1995, he attended about five or six bargaining sessions between Local 585 and Respondent BEP. In addition, in early 1995, Reed attended a bargaining session involving the facility located in Meadville, Pennsylvania. He did this as an employee observer at the invitation of the Union. At this meeting St. Cyr, Respondent BEP's chief negotiator, commented that he has noticed Reed at other bargaining sessions.

At some point prior to Reed's suspension but after the contract had expired, housekeeping employees were assigned the duty of mopping the floors. Before that time a maintenance employee had performed that task. Reed asked his supervisor, Missy Allen, why they now had to mop the floors; she explained that this was necessary because the number of residents in the facility had declined and that the maintenance employee had been assigned to clean the office area. In addition, as more fully described above, Reed was one of the employees whose work schedule was reduced one-half hour per day.

On November 10, shortly before his shift was to end, Reed kicked a plastic bucket while in the bathroom of a resident's room. This made a loud noise. At the time Reed did this the door to the bathroom was closed, but the door from the room to the corridor was open. The resident was occupying the room at the time. Nurse Jeffries came into the room and said that she had heard a loud noise and thought that the resident may have fallen. Reed told her that he was upset "about our additional workload and reduction in hours."

On November 14, while he was on vacation, Reed was summoned to the office of Angela Huffman, Respondent BEP's director of nursing at the facility. Also present was Larry Winger, steward for Local 585, and Missy Allen, housekeeping supervisor. Huffman said that Reed was being suspended pending an investigation because, on November 10, he made too much noise in the resident's room; she said that an RN had complained. Winger protested that it seemed unfair to announce the suspension while Reed was on vacation, but Huffman asserted that it could be done whenever they wanted to. Reed was given a document at that time which indicated that he was being suspended pending an investigation for committing a category 1 violation by violating rule 1.13.[36] It described the violation committed by Reed as "Improper, inappropriate conduct in the workplace." At some point Reed wrote on the document in the section provided for associate's comments: "Management dosent [sic] show Associates respect." Reed was given an opportunity to respond to the allegation in writing, but he chose not to. Thereafter, after Respondent BEP had completed its investigation of the matter, the following was added to the document in the section provided for supervisor's comments: "Investigation completed on 11–17–95. After reviewing statements and interviewing staff and residents we have changed to a category II violation #2.8. (Failure to maintain acceptable respect for others.)"[37] Also added to the document in the section provided for corrective action to be taken by the employee was: "[Reed] shall treat others with respect and kindness. And when he is upset or angry he should ask to speak in private with those necessary. Do not throw or bang items or equip. around room." Reed received a 3-day suspension.

Thereafter, Reed filed a grievance on the matter. At a grievance meeting Reed untruthfully said that he had accidentally hit the bucket.

The board's analysis in *Wright Line* applies to the determination of whether Reed's discipline violated the Act. The Board has restated that analysis as follows:

> Under *Wright Line*, General Counsel must make a *prima facie* showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9]

[7] NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983).

[8] See GSX Corp. v. NLRB, 918 F. 2d 1351, 1357 (8th Cir. 1990) ("By assessing a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")

[9] See Aero Metal Forms, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

Examining the General Counsel's case, I conclude that he has failed to meet his initial burden. It is clear that while Reed engaged in union activity, it was not the type of activity that differentiated him from other union supporters in any significant way. While the evidence shows that Reed was noticed by St. Cyr when he attended a bargaining session, there is no evidence of any animus directed to Reed. Nor is there evidence of

[36] This rule provides: "Conduct widely regarded as immoral, improper, fraudulent or otherwise inappropriate in the work place, including, but not limited to unlawful harassment of other associates."

[37] That rule provides: "Failure to maintain acceptable standards of respect for others."

timing from which unlawful motive could be inferred. Also, the General Counsel, in his brief, admits that Reed engaged in misconduct for which he deserved to be discipline. Thus, this is not a pretext case from which unlawful motive can be inferred.

The General Counsel argues that Reed's discipline was excessive. Under the disciplinary system then in place for category 2 violations of the type for which Reed was disciplined, "violations generally advance through four (4) progressive steps of discipline." The first step of that system would be a written warning since Reed had no prior history of misconduct of this type. Moreover, the General Counsel points out that on Reed's disciplinary memorandum, Respondent BEP initially checked the box indicating that the matter was at the step 1 level of discipline "1st written warning." The General Counsel argues that the 3-day suspension was excessive and therefore it was motivated by Reed's union activity. I find this argument unpersuasive. First, Respondent BEP's policy provides that "generally" progressive discipline would be applied; it is not set in stone. Second, the discipline given to Reed, when compared to his misconduct, is not so out of line as to compel the conclusion that some other factor must have come into play in Respondent BEP's decision to discipline him. Even if I were to consider this as some evidence tending to support a prima facie case, it is insufficient to carry the day in light of the absence of evidence of animus, timing, etc.[38] I conclude that the General Counsel has failed to carry his initial burden in establishing that the suspension of Reed violated the Act. Accordingly, I shall dismiss that allegation in the complaint.

3. Denise Foltz

The General Counsel alleges that Respondent BEP suspended on June 21, 1996,[39] again suspended on November 14, and then discharged on November 20, its employee, Denise Foltz, in violation of Section 8(a)(3) and (1). Foltz was employed at the Caledonia Manor facility located in Fayetteville, Pennsylvania. She began her employment there on March 30, 1994; she was employed as a part-time dietary aide. Her immediate supervisor was Lisa Pietropola, dietary manager. Since February 1997, Foltz has worked for District 1199P, Service Employees International Union as an organizer.

On June 26, Foltz received a performance evaluation that was approved by Maria Spinazzola, facility administrator. In seven of the eight categories for which she was evaluated, Foltz received a rating of "very good," which is the second highest rating of five possibilities; she received "satisfactory" in the eighth area. Her overall rating was "very good" and the evaluation contained generally favorable comments concerning Foltz' work. At the hearing, Spinazzola described Foltz as a "wonderful employee. She was very valued in the dietary department for her hard work and efforts."

Local 668 has represented certain employees at the facility for over 10 years. The Union and Respondent BEP recently agreed to a successor contract, the prior contract having expired on November 30, 1995. On April 1, 2, and 3, 1996, there was a strike in which about 35 to 40 employees participated and the facility was picketed. Foltz was not scheduled to work those days, however, she did participate in the picketing of the facility on each of the 3 days for about 6 to 8 hours a day. Foltz returned to work on April 4. During the strike several striker replacement employees were hired into the dietary department where Foltz worked; there also were several employees still working who had not been replaced. There was tension between the two groups of employees.

Foltz also filed several grievances. Although Foltz did not occupy any official position with the Local 668, she had been designated by Local 668 to be the person who filed the grievances in the absence of the regular grievance filer. On June 19, she filed a grievance concerning a 25-cent-per-hour supplement for performing training duties. The grievance was resolved at the second step of the grievance procedure with the result that Foltz received the training supplement. On June 21, Foltz filed a grievance on behalf of employee Betty Synder concerning the alleged failure to grant Synder every second weekend off. This grievance was resolved at the third step of the grievance procedure with the result that Synder was granted every second weekend off.

On June 21, Foltz began work at 1 p.m. Later that day Foltz was summoned into Spinazzola's office where Spinazolla said that she had received complaints from several employees that Foltz had been soliciting on behalf of the Union and distributing literature to employees while she should have been working.[40] Foltz admitted that she had done so, except that she said that she was beginning her 15-minute break. Foltz was told she was being put on a 3-day suspension pending investigation. Foltz was given written notification that she was being suspended pending an investigation for violating rule 1.14.[41] Under the portion of the document providing for supervisor's comments, it reads "Left job site to distribute union propaganda to other associates." Under the portion of the document provided for employee comments Foltz wrote "I do not feel I was in violation of this code of conduct because I was beginning my fifteen minute break and I was NOT threatening anyone."

On June 24, Foltz received a call from Spinazzola to report to work. Foltz was later told that day by Spinazzola that the allegations against Foltz were substantiated and that Spinazzola had also discovered that Foltz had distributed a union card on the work floor. Foltz admitted that she did give out the union card. On a copy of the written suspension that Foltz had been given 3 days earlier Spinazzola added "3 day suspension. Re-

[38] The General Counsel also argues that unlawful motive is established from the failure of Respondent BEP to adequately investigate the matter. That argument is not factually supported by the evidence in the record. I have concluded above that Reed was given an opportunity to present his written version of the events and that Respondent BEP investigated the matter before discipline was meted out.

[39] All dates hereinafter are in 1996 unless otherwise indicated.

[40] Spinazzola was unable to testify consistently as to the exact words she used to advise Foltz of this. I conclude, however, that the substance of the instruction is as related above. The record establishes that whatever words were used by Spinazzola, Foltz clearly understood that she was permitted to engage in union activity during her breaktime and during cross-examination Foltz admitted this is what Spinazolla told her.

[41] That rule provides "Violation of the Company's Code of Conduct and Business Ethics."

instated stating should harassment/distribution of union lit. occur again, she would be terminated." and "Suspension for 3 days. Explained to associate to only distribute literature on break time/off clock." Spinazzola advised Foltz that she was not to distribute literature or solicit while she was working; that if she did this again she would be terminated.[42]

At the hearing, Spinazzola explained that the discipline imposed on Foltz was based on complaints she had received from three employees regarding Foltz. One such report came from employee Vivian Hoover, who submitted a written note dated June 21 which stated, "I was in 212 working and came out the door when Denise Foltz handed me union documents and information to join union [sic]. Denise was pushing a cart of pitchers so she was obviously working." Another report came in the form of a statement signed by employees Brenda Rotz and Heather Hahn which read, "On 6/21/96 Denise Foltz approached me while I was cleaning St 1 Dining Room and she came out of the Dietary Dept. and handed me papers to read and sign about the Union, and wanted me to sign a 'petition-like' form right there & then, but, I refused. Reported to Supervisor and then to Administrator."[43]

Respondent BEP maintains a lawful no-solicitation rule that prohibits employees from engaging in solicitation during working time or in immediate resident-care areas; it also maintains a lawful no-distribution rule that prohibits employees from distributing literature in work areas of the facility. Respondent BEP has designated areas that employees may use to take their 15-minute paid breaks. These include a breakroom, outside the facility, and any area not being used by a resident. The dining room where the June 21 incident took place is considered a resident area where employees are not supposed to take a break.[44] Concerning breaktimes, Respondent BEP does not require employees at this facility to take their breaks at certain times; they are free to take them whenever they want. Respondent BEP also allows employees to engage in conversation with each other while they are continuing to work.

Spinazzolla reviewed the employee statements and considered Foltz' claim that she was starting her break. Spinazzolla decided that Foltz should be paid for the time that Foltz had been off from work as a result of the suspension. Spinazzola explained that she believed that Foltz "was possibly taking her 15-minute break," and since Foltz was a good employee, she decided to call Foltz back to work and pay her for the time that she was off.[45] However, Pietropola credibly testified that she did not believe Foltz' assertion that Foltz was starting her break when she encountered the employees. Pietropola explained that Foltz had just started work at 1 p.m. and the incident occurred around 2 p.m. and that most employees do not take a break so soon after starting work. She also explained that the incident occurred in the dining room where employees are not allowed to take breaks. Pietropola testified that she had no problem with Foltz or any other employee talking about the Union while they were working. However, Pietropola indicated that the problem with Foltz' conduct was that she was handing out literature and not working.

The General Counsel argues that the paid suspension and warning violated the Act. I apply the analysis in *Wright Line,* supra, in resolving this allegation. The General Counsel argues that Foltz was disciplined on June 21 because of her protected union activities. As of that date Foltz was one of many employees who had joined the picketing in April and had filed only two grievances. There is no evidence, for example, showing that grievance filing was rare and, thus, that this was a significant event. Neither of the grievances appears to be anything out of the ordinary; they seemed to be the typical grievances that could be expected in a mature bargaining relationship such as existed between Respondent BEP and the Union at this facility. Significantly, there is absolutely no evidence that Respondent BEP harbored animus towards Foltz because of those activities. While the timing of the discipline supports the General Counsel's case, other factors tend to undermine the argument. Most telling is that despite the fact that Respondent BEP had evidence that Foltz had violated its rules, Spinazolla decided to pay Foltz for the time off. I conclude that Spinazolla was, in effect, giving Foltz a break. This conduct hardly shows the animus that typically accompanies an effort to stifle union activity. Additionally, only 2 days later Foltz received a favorable work evaluation approved by Spinazolla. This too does not fit comfortably with the General Counsel's case. I conclude that the General Counsel has failed to meet its initial burden of showing that Foltz' picketing activity and grievance filing played a part in Respondent BEP's decision to discipline Foltz on June 21 and 24. I conclude that Foltz was disciplined for the reasons stated by Respondent BEP.

Before I turn to examine whether the reasons given by Respondent BEP for the discipline of Foltz were themselves lawful, I will address certain arguments made by the General Counsel in his brief. The General Counsel first argues that Spinazzolla's testimony should be discredited, based primarily on the obvious difficulty Spinazolla demonstrated at the hearing relating the words she used in advising Foltz as to when Foltz could or could not engage in union activity. I have considered that testimony, but I have determined to nonetheless credit the testimony of Spinazolla because I conclude that it is more believable on the whole than that of Foltz. In the same vein, the General Counsel argues that if Spinazolla had difficulty relating precisely what Respondent BEP's rules were concerning solicitation and distribution, how were the employees to understand the rules. The answer to this argument is that Respondent BEP posted rules that were clear and there is no credible evidence that clear language of the rules was obfuscated to the degree that the rules became ambiguous. Indeed, Foltz clearly understood throughout her employment that she was allowed to engage in solicitation during her breaktime;

[42] The foregoing facts are based on the testimony Pietropola and Spinazzola. Where the testimony of Foltz is in conflict with their testimony, I do not credit Foltz.

[43] In light of hearsay objections these documents were not received for the truth of the matters asserted therein but only as reports relied upon as a basis for the discipline.

[44] Foltz testified that she did take her break in the dining room when the weather was hot and the air conditioning was not functioning in other break areas. Assuming this was the case, there is no evidence that on June 21 there was any heat problem that would justify this deviation from the normal rule.

[45] Foltz did not deny that she was paid for the time off.

indeed she asserted that as a reason her conduct was not improper. The General Counsel also argues that since Spinazolla believed that Foltz had, in fact, been on breaktime at that time and, thus, paid her for the time off, it was inconsistent, if not unlawful, for Spinazolla to fail to rescind the discipline in its entirety. I do not interpret Spinazzolla's testimony in this way. Having heard the testimony while observing the demeanor of the witness, I conclude that what Spinazolla was relating was that she believed that Foltz had "possibly" been taking her break and not, as the General Counsel argues, that she believed Foltz completely.

The reason given by Respondent BEP for Foltz' discipline is that she engaged in solicitation and distribution of literature during working time. Inasmuch as Respondent BEP had lawful rules restricting such activity to nonworking times, such discipline would not be unlawful if the employee breached the rules. *Our Way, Inc.,* 268 NLRB 394 (1983). I conclude that Respondent BEP had reasonable cause to believe that Foltz engaged in union activity during working time based on the statements supplied to it by employees Hoover, Rotz, and Hahn. Those statements clearly assert that Foltz was on working time when she approached the employees. Also, these statements could reasonably lead Respondent BEP to conclude that Foltz' conduct did not fall within the policy allowing employees to talk while performing work, since the statements demonstrate that Foltz and the employees did not continue to perform work while they engaged in the activity.

The General Counsel argues that I should draw an adverse inference against Respondent BEP for failing to call those employees as witnesses at the hearing, citing *National Football League,* 309 NLRB 78, 97–98 (1992), and *Sahara Las Vegas Corp.,* 297 NLRB 726, 730 (1990). *National Football* stands for the well-settled rule that an adverse inference may be drawn where a party fails to call a witness within its control. Here, the witnesses were employees equally within the control of all parties and thus it would be improper to draw any adverse inference. In *Sahara Las Vegas* there is the following comment made by the administrative law judge, "Although Harris is a current employee of Respondent, he was never called as a witness." Id. at 730. To the extent that that statement is meant to draw an adverse inference from the failure to call an employee as a witness, it is clearly inconsistent with established Board law and, thus, has no precedential value.

Next, the General Counsel challenges the statement signed by employees Rotz and Hahn by pointing out that it appears not to be in their handwriting and it uses words such as "I" when it is signed by both of them. However, it is clear that the documents appear to be signed by those employees and, thus, Respondent BEP was entitled to rely on the contents in determining whether to impose discipline. Again, I conclude that Respondent BEP had evidence sufficient to form a reasonable belief that Foltz had engaged in conduct that violated its lawful rules concerning solicitation and distribution.

I now examine the evidence to determine whether the General Counsel has established that Foltz had not, in fact, engaged in the union activity during worktime. Foltz testified that she assumed that Rotz and Hahn were taking a break. This was despite the fact that they were not allowed to do so in that dining room and despite the fact that this incident occurred around 2:30 p.m. and the employees were scheduled to leave at 3 p.m. Foltz claimed that she was starting her break when she engaged the employees in the discussion about the Union and gave them union cards and other literature, explaining to the employees that it was a "closed shop." Even though the contract had expired, Foltz testified that she believed that after the 90-day probationary period, "then you signed a card" and employees had to join the union. Foltz also explained that when she used the phrase "closed shop" she meant that employees had "to sign a card in order to work [here]." Foltz testified that on a "couple of occasions" she had previously taken a break in the dining room when it was very hot in the kitchen because the air conditioner was not working and it was cooler in the dining room, and that she had seen other employees take breaks there also. Concerning the incident with employee Hoover, Foltz testified that this began when she encountered Hoover while they were clocking in together before starting work. At that time she told the Hoover that she had union cards and would give them to Hoover later. Later that day Foltz passed Hoover in the hallway on station three near the elevator and Foltz handed the Hoover a union card. Foltz explained that she normally works on the first floor but was on the third floor to clean up the station 3 dining room. Based on the demeanor of the witnesses and the totality of circumstances, I do not credit Foltz' testimony that she or the other employees were on breaktime when engaged in the union activity.

It is important to note that the General Counsel is not alleging and has not established that the solicitation and distribution rules were disparately enforced against union activity.[46] Instead, the General Counsel argues that Foltz' testimony should be credited to establish that the activity took place on nonwork time, a fact which I decline to find. Accordingly, I conclude that the General Counsel has not established that Respondent BEP violated the Act by disciplining Foltz on June 21 and I shall dismiss that allegation of the complaint.

After the June 21 incident, Foltz continued to file grievances. On July 11, she filed a grievance for employee Helen Mort over the alleged failure to give Mort additional hours of work that were instead given to a less senior employee. The grievance was not resolved at the third step of the grievance procedure: however, Mort left the employment of Respondent BEP and, thus, the grievance was never resolved on its merits. On July 16, Foltz prepared a grievance on behalf of herself and presented it to Lisa Pietropola, dietary manager. The grievance alleged Foltz was being harassed because of her union activity in that a nonunion employee had supposedly told Foltz that the nonunion employee had been coerced into signing a statement that indicated that the employee and Foltz had discussed union matters, apparently during working time. In the grievance, Foltz asserted that there was no rule concerning what could or could not be talked about while working. The record does not clearly indicate the status of that grievance. On July 16, Foltz

[46] The General Counsel does point out that employee Hoover admitted accepting a union card and other literature from Foltz, yet only Foltz was disciplined. However, it is clear that Foltz initiated the incident and that this reasonably explains the failure to discipline Hoover.

also filed a grievance on behalf of employee Barbara Fahnestock. The grievance asserts that Fahnestock and two other employees failed to follow patient care procedure. According to the grievance, Fahnestock, who had joined the strike in April, was allegedly disciplined while the other two employees, who had not joined the strike, were not disciplined. At the hearing, Foltz admitted that none of the employees were actually disciplined; that Fahnestock was actually moved from station 3 to station 1 to be observed more closely and that Foltz was told that the other employees involved would also be monitored more closely. The grievance on this matter had not yet been resolved by the time of the hearing. The next day, Foltz, Fahnestock, and Carol Lyttle, director of nurses, discussed the grievance. During this discussion Foltz perceived that the employees had been threatened by Lyttle so Foltz filed another grievance on behalf of Fahnestock that alleged that Lyttle had threatened Fahnestock to withdraw the earlier grievance.[47] This grievance too had not yet been resolved. On August 8, Foltz filed a "class action" grievance alleging that Spinazzola, administrator, had been soliciting employees to decertify the union. Like the preceding grievances, this one has not yet been resolved. On October 17, Foltz filed a grievance on behalf of employee Sherry McKnight concerning the manner in which she was allegedly being called back from workers' compensation leave. On November 16, Tena Kauffman filed a grievance on Foltz' behalf alleging that Foltz was improperly disciplined on November 7, in that she had never been trained in the use of chemicals or pumps to be used in connection with the chemicals. Finally, on November 16, Kauffman filed another grievance on Foltz' behalf alleging that discipline that Foltz had received was a result of her union activity and because she had participated in an OSHA inspection. These last two matters are dealt with in more detail below.

On September 4, Foltz attended a safety in-service meeting of dietary employees; Pietropola was present. During the course of the meeting Foltz raised safety matters such as a leaky dishwashing machine, loose tiles on the floors, and a loose handle on the coffeepot. Foltz also discussed the inadequacy of the first aid safety kit with Lyttle, director of nurses. Each of the concerns raised by Foltz were corrected, although the precise time the corrections were made is not clear from the record. Foltz continued to discuss safety matters with other employees. On September 24, Foltz filed a complaint with the U.S. Department of Labor, Occupational Health and Safety Administration. In the portion of the complaint received by Respondent BEP a number of alleged hazards were identified. These included a broken latch on a blender that caused an employee to sustain burns, an inadequate chain glove for use on the meat slicer, an inadequate first aid kit, a leak in the dishwashing machine, and slippery floors. The complaint also raised concerns of infection control and patient handling; it complained of flooding in the laundry room, inadequate ventilation in the laundry department, broken springs on the mop buckets, and other matters.

[47] The General Counsel does not allege that this incident violated the Act.

On November 7, there were rumors that OSHA would be conducting an inspection of the facility that day. An OSHA inspector did arrive that day. When Spinazolla asked the inspector whether he had a search warrant, he left the building.[48] Also, Pietropola admitted that on that day Foltz told her that she was the person who had called OSHA. Other events occurred later that day which the parties argue show Respondent BEP's state of mind concerning Foltz.

Foltz was designated by the Union as one of its three representatives to accompany the OSHA inspector on the inspection of the facility. On November 7, before her scheduled work hours, Foltz went to the facility. She went into the kitchen where other employees were working preparing the lunch meal. As she walked through the kitchen she tapped employee Tom Atherton on the back and said, "They're here, they're here,"[49] referring to the OSHA inspector. She used the telephone to call the Union and her mother, who also works at Caledonia Manor, concerning the OSHA inspection. While she was in the kitchen area Foltz was not wearing the white slacks, blue smock top, and hair net that is the required uniform. Foltz then went to the lobby area of the facility where she was joined by Kauffman, chief steward. After waiting for about 20 minutes they were told by Spinazzola that the OSHA inspector had left the facility and the inspection had been postponed.

Respondent BEP maintains a lawful posted rule at the facility which prohibits employees from being on the premises unless they are scheduled to work and also maintains a rule which prohibits making personal telephone calls without permission except in cases of emergency. The practice concerning the use of the telephone for personal business is that employees ask a supervisor for permission to use the telephone when a supervisor is present, and permission is routinely granted.[50]

Rebuck, director of rehabilitation, observed Foltz' conduct in the kitchen and reported it to Pietropola, Foltz' immediate supervisor; together they reported the matter to Spinazzola, who advised them not discipline Foltz but to speak directly with Foltz. Rebuck then orally advised Foltz of the proper procedures concerning use of the telephone for personal calls.

Foltz returned home and then came back to the facility at the start of her working schedule. At that time Foltz had a conversation with Pietropola concerning her duties for that day. Foltz was assigned to clean an oven. She asked if they had oven cleaner for that work; Pietropola said no, but that Foltz should use the "Master Degreaser" to do that job. Foltz proceeded to put on latex gloves and attempted to pour the "Master Degreaser" from the gallon bottle into the smaller spray container. In the process, Foltz splashed some of the chemical on her right arm. After rinsing her arm in cold water, Foltz went to a nurse's station and requested that an accident report be

[48] This is based on the credible testimony of Spinazzola.

[49] This is based on the testimony of Holly Rebuck, director of rehabilitation, which was detailed, consistent, and inherently probable. Based on these factors as well as demeanor, I conclude that Rebuck is a credible witness.

[50] This is based on a composite of the credible testimony of Pietropola and Rebuck. The testimony of employee Beth Carbaugh corroborates this testimony to a significant degree.

filled out. Then the nurse and Foltz returned to the kitchen and attempted to go through the material data safety sheets to ascertain how the spill should be handled but they had difficulty determining what should be done. The nurse decided that Foltz should go to the hospital for treatment. At the hospital the doctor told Foltz that she had properly rinsed her arm in cold water and that she was free to go back to work. After returning to work Foltz was called into Pietropola's office; also present was Rebuck. Foltz was given a disciplinary notice for not following safety procedures. The notice specified that Foltz had violated rule 2.7[51] and that this was her second written disciplinary notice, albeit for violating different rules.[52] Foltz was required to watch safety videos before she again returned to work.

Pietropola was in the area with Foltz when the accident occurred. She explained that Foltz could easily have avoided the accident had she used a dispenser that was available to her to pump the chemical into the container. Pietropola personally trained Foltz in the use of the dispenser. This is the reason that Foltz was disciplined.[53]

The OSHA inspection finally did occur on November 12 and 13. Foltz, along with three other employees, represented the Union at the initial conference with the inspector; Spinazzola and Lyttle were present on behalf of Respondent BEP. In addition, on November 12, Foltz accompanied the inspector during the inspection of the dietary department. During that time Foltz pointed out to the inspector some of the alleged safety defects that already had been corrected. Spinazzola, Lyttle, and Pietropola were also present. The next day the inspector returned to the facility and another meeting occurred. During the meeting the inspector issued a citation to Respondent BEP and commented on the palpable tension between the employees and the employer. Spinazzola suggested that Foltz become a member of the health and safety committee, and Foltz agreed to do so. The citation cited five items. Item 1 concerned a coffee urn table that did not have the requisite exit access space between it and the wall; item 2 concerned a power cord for the food slicer that had a cut covered with an unknown substance; item 3 indicated that electrical boxes had been blocked with storage carts; item 4 revealed that a light bulb lacked a cover; and item 5 concerned the lack of training that employees received when new or replaced chemicals were introduced into the workplace. No financial penalties were assessed.

The next day, November 14, Spinazzola walked into the kitchen area where Foltz was working. Because Foltz had been invited to serve on the health and safety committee, Foltz told Spinazzola of a number of ideas she had concerning safety matters. During the conversation Spinazzola told Foltz that Foltz should come into Spinazzola's office. Because of the grim look on Spinazzola's face, Foltz asked if this concerned her job. Spinazzola said that it did. Foltz asked if it could wait until 3 p.m. so that a union representative might accompany them. Spinazzola replied that the matter could not wait and she should find another representative. Foltz found a union steward and they went to Spinazzola's office. Spinazzola said that they had received a complaint that Foltz had harassed another employee. She asked Foltz whether Foltz had ever said that Beverly was being sued for Medicare fraud and whether Foltz had ever told an employee that the employee had to sign a union card within 90 days or be fired. Foltz admitted that she had done so.[54] Foltz was given a disciplinary notice that indicated that Foltz had violated rules 1.6,[55] 1.12,[56] and 1.21[57] and that Foltz was being suspended pending an investigation.

Prior to imposing this suspension on Foltz, Pietropola received a telephone call at home from employee Melissa Harlacher. Harlacher complained that Foltz had been harassing her. Pietropola told Harlacher to put her complaint in writing, which Harlacher did. This document is dated November 11 and is signed by Harlacher. It reads, "On Sunday October 27th Denise Foltz approached me and asked me if anyone talked to me about the Union. I told her I know nothing about the Union. She went on to tell me about the strike and why they did. She said they went out for better staffing. I said I thought they went out for more money. Denise said that Beverly Nursing homes are the highest pd. in nursing homes. Then she said Beverly is being sued for welfare fraud. Because they are getting paid for beds that are empty. She said that right now they are fighting for one of the residents to get thier [sic] air conditioner & t.v. back. And then I said I'm not going to beat around the bush about the union. I told her I did not want to join. For one of the reason [sic] is it will cause a confliction [sic] in my household with my husband. He was against the union. She said she could give me some phamphlets [sic] about the union for my husband to read. I said Denise its not gonna work. If you could guarantee me $1000.00 for my housepayment per month if anything would happen I will join. She said she couldn't do

[51] That rule provides, "Failure to follow safety rules."

[52] The General Counsel does not allege that this discipline violated the Act.

[53] These facts are again based on the credible testimony of Pietropola.

[54] This is based on the credible testimony of Spinazzola.

[55] The rules maintained by Respondent BEP at the Caledonia Manor facility were received into evidence without objection. Rule 1.6 for that facility provides "Making false defamatory, or malicious statements about a resident, associate, supervisor or the company." As Respondent BEP points out in its brief on the allegations arising at the Caledonia Manor facility, this rule is substantially different from rule 1.6 described earlier, which I have found unlawful. I conclude from the fact that the General Counsel failed to object to the introduction of this rule, failed to introduce any specific contrary evidence concerning the rule in effect at the Caledonia Manor facility, and failed to request a reopening of the case to clarify the matter after Respondent BEP's assertion in its brief that the Caledonia Manor rule is different from the rules applied at other facilities, that the General Counsel does not contest that fact and does not contend in this proceeding that the rule is itself unlawful. In any event, I credit the testimony that rule 1.6 in effect at Caledonia Manor is described in this paragraph. I thus conclude that despite the earlier general testimony that the disciplinary rules were implemented for all the facilities in the Pennsylvania area, based on the uncontested specific evidence concerning the Caledonia Manor facility, for a reason unexplained in the record, Respondent BEP's facility at Caledonia Manor had its own rule 1.6.

[56] That rule provides "Verbal or physical threats against the facility, residents, visitors or other associates."

[57] That rule provides "Insubordination." Spinazzolla explained that this referred to her earlier instructions to Foltz that Foltz was to confine her union activity to nonworking time.

that. Then she said that if Maria [Spinazzola] or anyone came to me to sign any papers about keeping the union out she told me not to sign them that they were all a bunch of lies, then I said I'm not joining Denise it will cause a fight at my house. She told me that after my 90 days I *had* to join or I would be fired from my job this all happened while we were on the clock not on brake [sic]."[58]

At the hearing, Foltz admitted that she had a conversation with Harlacher while both were on working time. Foltz testified that she asked Harlacher if Harlacher had any questions about the union and she told Harlacher that Harlacher could not join the union until after her 90-day probationary period; Foltz initially denied making any reference to a closed shop. Later, when confronted with the affidavit she had given during the investigation of the charge, Foltz admitted that she may have used the phrase "closed shop" in the discussion with Harlacher. Later, Foltz admitted that Harlacher said that she did not want to join the union; that it would cause a conflict in the household since her husband was antiunion. Foltz denied telling Harlacher that she would be fired if she did not join the Union. Foltz testified that during this conversation she asked Harlacher if Harlacher had heard from Harlacher's sister-in-law that Caledonia Manor was being paid by Medicare for the beds in the Medicare wing whether or not the beds were occupied. However, in her affidavit there is no reference to Harlacher's sister-in-law; instead it indicates that Foltz directly stated the allegation concerning Medicare. Still later Foltz testified that she asked Harlacher whether her sister-in-law had said anything "about them being paid for Station 2, whether the beds were empty or full" and Harlacher replied that she had not heard anything. This shifting testimony supports my conclusion not to fully credit Foltz' testimony.

Pietropola testified that she recommended that Foltz be discharged because she was harassing other employees and keeping them from doing their work and that Foltz was doing this on company time which kept Foltz from doing her work also.

On November 20, Foltz was called into Spinazzola's office. Accompanied by a union representative, Foltz went to the facility. Spinazzola advised Foltz that the allegations against her were substantiated and that Foltz was fired. Foltz replied "Good, because I have another job anyway."

At some point later during the processing of the grievance that Foltz had filed over her discharge, Foltz asserted that the source of the information concerning Medicare fraud came from another employee who told yet another employee who told Foltz. Spinazzola was unable to explain why Respondent BEP did not take action against these other employees.[59]

As indicated, the General Counsel contends that Foltz' suspension of November 14 and her discharge on November 20 violated the Act. I again apply the analysis set forth in *Wright Line,* supra. It is clear that Foltz continued to engage in protected activity after she was disciplined on June 21. Thus, she filed a number of grievances, engaged in safety related discussions with other employees, made safety-related complaints on behalf of employees to Respondent BEP, filed a complaint with OSHA concerning the employees' safety concerns, and acted as a representative for the Union during the OSHA inspection. It is obvious that Respondent was aware of these activities, including the fact that Foltz played at least some role in the filing of the OSHA complaint. This is so because the portion of the OSHA complaint which Respondent BEP was provided contained several matters that were identical to the complaints that Foltz had previously made to Respondent BEP. In fact, Pietropola admitted that she was told by Foltz that Foltz had called OSHA. Timing also supports the General Counsel's case in that Foltz' suspension and termination occurred shortly after the OSHA inspection. However, on an examination of the entire record, I conclude that the General Counsel has failed to carry his burden of showing that these activities played a part in the Foltz' suspension and discharge.

First, I again note the absence of animus. In an apparent effort of establishing this important element of the case, the General Counsel points to a number of items. First, he points to a conversation during a grievance meeting between employee Fahnestock and Lyttle, director of nurses, at which Foltz was present. During that conversation Lyttle said that if Fahnestock wanted to continue the grievance, then Lyttle would write up Fahnestock for past violations. Fahnestock did not drop the grievance; however, she did not receive any discipline for past misconduct. The General Counsel does not allege that this conduct violated the Act. In assessing the weight I give to this incident, I note that the Lyttle's statements were directed to Fahnestock and not Foltz. I further note that Lyttle played no role in the decision to discipline Foltz. I conclude that this incident is insufficient to establish that Respondent BEP harbored animus towards Foltz because of her protected union activity. Next, the General Counsel argues that the fact that Respondent BEP disciplined Foltz as a result of the work accident on November 7 shows its animus. However, in light of my credibility resolution of the facts surrounding that incident, I conclude that the discipline was appropriate. The General Counsel next turns to the telephone incident on November 7 and argues that it shows that Respondent BEP harbored animus. To the contrary, based on the facts as I have found them, Respondent BEP acted in a restrained, appropriate manner in merely reminding Foltz of the rules concerning the use of telephones for personal calls. These matters, even taken together, fail to adequately establish the element of animus. I conclude that the General Counsel has failed to meet his initial burden of showing that the discipline and discharge of Foltz was related to her protected union activities described above. I conclude that Foltz was disciplined and then discharge for the reasons given by Respondent BEP. Even assuming that the General Counsel has met his initial burden on this matter, I conclude for reasons stated below that Respondent BEP has established that it would have meted out the same discipline even if Foltz had not engaged in protected union activity.

[58] Like the other reports, these document was not received for the truth of the matters asserted therein. Employee Lisa Bittinger testified that she overheard a conversation between Foltz and Harlacher sometime in the summer or fall of 1996. However, this testimony is lacking in details and certainty. After also considering demeanor, I conclude that Bettinger's testimony is of little use in determining what actually was said on critical day in question.

[59] The foregoing facts are derived from the credible testimony of Pietropola and Spinazolla.

The evidence shows that Respondent BEP reasonably believed that despite the fact that Foltz was warned on June 21 and 24 that she was to confine her union activity to nonwork time, she defied these instructions and continued to engage in union activity during working time. This reasonable belief is based on the statement given by Harlacher. The General Counsel seeks to undermine the value of the Harlacher statement by pointing to a conversation that Spinazolla had with employee Reid where Spinazolla asked Reid whether she had been harassed by Foltz and whether this occurred while they should have been working. The General Counsel reads from this that Spinazolla was on a "fishing expedition" to unearth conduct by Foltz. I disagree. I have already concluded that on June 21 Foltz had been lawfully disciplined for breach of the rules concerning solicitation and distribution and had been warned not to do so, again. Thus, this conversation seems less of a fishing expedition and more of an effort by Spinazolla to enforce Respondent BEP's rules. I further note that the substance of the conversation between Spinazzolla and Reid is not alleged to be violative of the Act.

The General Counsel also argues that Spinazolla admitted that after Foltz was discharged, Spinazolla learned that Foltz claimed that the source of the Medicare fraud assertion was two other employees and that Spinazolla admitted that she did not discipline those employees and could not explain her failure to do so. However, despite the inadequacy of Spinazzolla's explanation, it is apparent that Foltz' assertion, coming as late in the process as it did, appears to be an afterthought. I again note that the General Counsel has not established any disparate enforcement of Respondent BEP's rules concerning solicitation and distribution of literature. Finally, I note that the General Counsel does not argue that the content of the conversation that Foltz had with Harlacher remained protected despite the fact that it was done during working time in breach of a lawful rule proscribing such conduct.

I conclude that Foltz was again suspended and then discharged because Respondent BEP reasonably believed that she continued to engage in union activity during worktime. Accordingly, I shall dismiss those allegations in the complaint.

H. The Affirmative Defenses

Respondents assert a number of affirmative defenses. They contend that these proceedings are barred under *Jefferson Chemical Co.,* 200 NLRB 992 (1972). Specifically, Respondents point out that the allegations in the complaint in this case covered matters that occurred before the complaint issued in Case 6–CA–27873, a case that was tried before an administrative law judge on various dates, September 12, 1996, through March 11, 1997. Respondents argue that since the General Counsel failed to consolidate this case with the prior case he is now precluded from litigating this case separately. In *Jefferson Chemical,* the Board dismissed a complaint alleging that an employer violated Section 8(a)(5) by engaging in bad-faith bargaining when earlier the General Counsel had litigated a case against that employer involving allegations of unilateral changes in violation of Section 8(a)(5). The allegations on both cases occurred in the same timespan. The General Counsel argues that *Jefferson Chemical* does not apply to the situation in this case, citing *Maremont Corp.,* 249 NLRB 216, 217 (1980), and *Harrison Steel Castings Co.,* 255 NLRB 1426 (1981). I agree with the position taken by the General Counsel. Respondents do not argue that the allegations in this case are closely intertwined with the allegations in the prior case. They do not point out how they have been prejudiced by the separate litigation of these cases. To the contrary, it appears that this case raised wholly separate litigable issues quite apart from any other pending case. "To accept Respondent's argument . . . would not only severely restrict the General Counsel's discretion, but also allow a respondent to delay indefinitely the ultimate litigation of any charges by simply engaging in further unlawful conduct." *Harrison Steel,* supra at 1427. I conclude that *Jefferson Chemical* is not meant to apply to a situation such as this where a respondent is involving litigation spanning several years and the General Counsel pursues the litigation in reasonable, self-contained segments. Accordingly, this defense lacks merit.

Respondents assert that I improperly ruled on various subpoena matters. Prior to the hearing, Respondents filed petitions to revoke subpoenas issued at the request of the General Counsel. I denied those petitions on the basis that the documents sought by the General Counsel were relevant to the issues raised by the pleadings. Respondents do not specifically indicate why that ruling was in error or how they were prejudiced by it. The General Counsel also filed a petition to revoke subpoenas issued at the request of Respondents. Those subpoenas were directed to the Regional Director and concerned documents in the regional case files and other agency documents. Inasmuch as permission had not been granted by the General Counsel for the disclosure of those documents, I granted the petition to revoke citing Section 102.118 of the Board's Rules and Regulations, Series 8, as amended. *G.W. Galloway Co.,* 281 NLRB 262 fn. 1 (1986), vacated on other grounds 856 F.2d 275 (D.C. Cir. 1988). Finally, the Union filed a petition to revoke subpoenas served upon it at the request of Respondents. I granted the Union's petition because I determined that the documents sought were either not relevant to any issue raised by the pleadings in this case or the effort to obtain them was an improper attempt to circumvent Section 102.118 of the Board's Rules. *H. B. Zachary Co.,* 310 NLRB 1037 (1993). I reaffirm my rulings on these matters.

Having argued above that the General Counsel improperly failed to consolidate this case with a prior case, Respondents next argue that the consolidation of the charges in this case breached the so-called "Standstill Agreement" signed by Respondents and the General Counsel. This refers to a written agreement signed by the General Counsel and Beverly Health and Rehabilitation Services, Inc. on March 22, 1995. That document sets forth an agreement concerning how the parties should proceed in light of the numerous cases that were pending on allegations that unfair labor practices had been committed. Among other things, a matter specifically addressed in the agreement was the continuing litigation of whether the various facilities constituted a single employer. The parties agreed to adhere to their positions on that issue, but they also agreed that for the duration of the agreement the General Counsel would not continue to allege the single employer argument in certain

identified new cases nor request extraordinary remedies in those cases. Regarding consolidation, the agreement provides: "Notwithstanding the foregoing, cases may be consolidated, in accordance with the Board's normal procedures concerning consolidation of cases, where consolidation is deemed appropriate unrelated to the single employer issues litigated or the remedies being sought in [two prior proceedings], such as for reasons of efficiency or convenience of counsel or witnesses." The agreement further provides: "Nothing herein shall preclude the General Counsel from consolidating cases in the future if the General Counsel determines that such action is appropriate; nor shall anything herein preclude Beverly from arguing that any past or future consolidation of cases against Beverly is contrary to the Board's Rules and Regulations, a denial of due process, or otherwise unlawful or improper." This language makes clear that the General Counsel may continue to consolidate cases in accordance with normal Board policy so long as he does not base the consolidation on the single employer or extraordinary remedy issues. Respondents also assert that the consolidation of the charges in this case violate the Agency's Casehandling Manual and also violate due process of law, yet they do not support those assertions with a specific rationale. I conclude that the "Standstill Agreement" did not preclude the consolidation of the charges in this case and, in light of the obvious commonality of facts and issues present in this case, that the consolidation was consistent with the Board's rules.

Respondents also assert that the allegations of the complaint pertaining to the Grandview facility are subject to the grievance procedure of the applicable collective-bargaining agreement. I have concluded above, however, that the contract covering that facility had been terminated and, therefore, was not effect at the time the alleged unfair labor practices occurred and thereafter. Under these circumstances deferral to the grievance-arbitration procedure is not appropriate.

In their answer Respondents assert a number of additional defenses. These include that the complaint is not supported by timely filed charges; that the allegations in the complaint are barred by Section 10(b) and/or laches; that the charges were not validly filed or served, and that the complaint was not validly filed or served. However, nowhere, neither in their answer, nor at the hearing, nor in their briefs, do Respondents expand upon these mere assertions. I note that Respondents filed answers to the several complaints that issued in this case; they appeared at the hearing and had a full opportunity to participate in it, and they filed posthearing briefs. I conclude that Respondents have failed to meet their burden of proving these defenses. *Sage Development Co.,* 301 NLRB 1173, 1189 fn. 37 (1991). Moreover, under these circumstances the alleged defenses are so vague that the General Counsel has not had a reasonable opportunity to present evidence to address them. I further conclude that by failing to press these defenses beyond mere assertions, Respondents have abandoned and, therefore, waived them. *Fredericksburg Glass & Mirror,* 323 NLRB 165 fn. 4 (1997).

CONCLUSIONS OF LAW

1. Respondent BEP is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and operates health care facilities within the meaning of Section 2(14) of the Act.

2. Respondent BHR is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and operates health care facilities within the meaning of Section 2(14) of the Act.

3. Local 585, Local 668, and District 1199P are each labor organizations within the meaning of Section 2(5) of the Act.

4. The following employees Respondent BEP constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service and maintenance associates including nursing assistants, housekeepers, dietary aides, cooks, laundry aides, unit clerk, floor maintenance, and activity aides employed by the Employer at its 1293 Grandview Road, Oil City, Pennsylvania facility; excluding all other associates including professional associates, office clerical, management associates, central supply clerk, casual and temporary associates, guards, and supervisors as defined in the National Labor Relations Act.

5. The following employees Respondent BHR constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service and maintenance associates including nursing assistants, housekeepers, floor care workers, dietary aides, cooks, laundry aides, physical therapy aides, activity aides and unit secretaries employed by the Employer at its 425 North Duke St., Lancaster, Pennsylvania facility; excluding all other associates including professional associates, office clerical associates, management associates, central supply clerk, guards, and supervisors as defined in the National Labor Relations Act.

6. The following employees Respondent BEP constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed practical nurses employed by the Employer at its Oil City, Pennsylvania facility; excluding the medical records coordinator, registered nurses, service and maintenance employees, office clerical employees, management employees, casual and temporary employees and guards, professional employees, and supervisors as defined in the Act.

7. By unilaterally implementing revised disciplinary rules for unit employees at the Grandview and Duke facilities, Respondents violated Section 8(a)(5) and (1) of the Act.

8. By promulgating and maintaining disciplinary rules 1.4 and 1.6 which are overly broad and tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights, Respondents violated Section 8(a)(1) of the Act.

9. By unilaterally revising and reducing the hours of work of the service and maintenance unit employees at the Grandview facility, Respondent BEP violated Section 8(a)(5) and (1) of the Act.

10. By unilaterally revising the job descriptions and job duties for the LPN unit employees at the Grandview facility, Respondent BEP violated Section 8(a)(5) and (1) of the Act.

11. By suspending employee Oneita Say because she engaged in protected union activities, Respondent BEP violated Section 8(a)(1) of the Act.

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

13. Respondents did not violate the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondents unlawfully implemented revised disciplinary rules for unit employees at the Grandview and Duke facilities. I shall order Respondents to rescind those rules. In addition, I shall order Respondents to rescind any discipline issued to employees pursuant to unlawfully implemented rules and make whole employees for any loss of pay or benefits they may have suffered as a result of such discipline. *Tocco, Inc.,* 323 NLRB 480 (1997). However, Respondents shall be permitted to show at the compliance stage of these proceedings that they would have disciplined such employees under the disciplinary rules that existed prior to the implementation of the unlawful rules. *Great Western Produce,* 299 NLRB 1004 (1990).

I have found that Respondents unlawfully promulgated and maintained rule 1.4 at each of the 20 facilities listed in the complaint and rule 1.6 at each of those facilities except the Caledonia Manor facility. I shall order Respondents to rescind those rules at those facilities. In addition, I shall order Respondents to rescind any discipline issued to employees pursuant to those rules and make whole employees for any loss of pay or benefits they may have suffered as a result of such discipline. *Tocco,* supra. However, Respondents will be permitted to show at the compliance stage of these proceedings that they would have lawfully disciplined such employees even in the absence the unlawfully promulgated rules. *Great Western Produce,* supra.

I have found that Respondent BEP unlawfully revised and reduced the hours of work for certain service and maintenance employees at the Grandview facility. I shall order Respondent BEP to rescind the reduction in hours, restore the hours of work to what they were prior to the unlawful reduction, and make employees whole for the loss of pay and benefits they suffered as a result of the reduction of hours.

I have found that Respondent BEP unlawfully issued new job descriptions for, and changed the job duties of, the LPNs at the Grandview facility. I shall order Respondent BEP to rescind the new job descriptions and job duties.

I have found that Respondent unlawfully suspended employee Oneita Say. I shall order Respondent BEP to make Say whole for the loss of pay and benefits she suffered as a result of the unlawful suspension.

It is possible that pursuant to the unfair labor practices I have set forth above, employees may have been unlawfully discharged or laid off. In that event Respondents must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[60]

ORDER

A. Respondent Beverly Enterprises-Pennsylvania, Inc., Oil City, Pennsylvania,its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing to employees represented by Local 585 revised disciplinary rules without first giving Local 585 an opportunity to bargain concerning the rules.

(b) Promulgating and maintaining disciplinary rules 1.4 and 1.6.

(c) Revising and reducing the working hours of employees represented by Local 585 without first giving Local 585 an opportunity to bargain concerning the reduction of hours.

(d) Issuing revised job descriptions for, and changing the job duties of, LPNs represented by Local 585 without first giving Local 585 an opportunity to bargain concerning the job description and job duties.

(e) Suspending or otherwise discriminating against employee Oneita Say or any other employee because they engage in protected union activity.

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

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

(a) Rescind the unlawfully implemented revised disciplinary rules, rules 1.4 and 1.6, the unlawful reduction in working hours, and the unlawfully issued revised job descriptions and job duties.

(b) Restore the working hours for employees to what they were prior to the unlawful reduction.

(c) In the manner described in the remedy section of this decision, within 14 days from the date of this Order, offer employees entitled to reinstatement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

[60] 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.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge or discipline, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge or discipline will not be used against them in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Grandview facility in Oil City, Pennsylvania, copies of the attached notice marked "Appendix A" and at the facilities listed below[61] copies of the attached notice marked "Appendix B."[62] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 5, 1995.

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

B. Respondent Beverly Health and Rehabilitation Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing to employees represented by Local 668 revised disciplinary rules without first giving Local 668 an opportunity to bargain concerning the rules.

(b) Promulgating and maintaining disciplinary rules 1.4 and 1.6.

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

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

(a) Rescind the unlawfully implemented revised disciplinary rules, and rules 1.4 and 1.6.

(b) In the manner described in the remedy section of this decision, within 14 days from the date of this Order, offer employees entitled to reinstatement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Duke facility in Lancaster, Pennsylvania, copies of the attached notice marked "Appendix C" and at the facilities listed below[63] copies of the attached notice marked "Appendix D."[64] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 1995.

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

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

[61] 1. Beverly Manor of Monroeville, Monroeville, Pennsylvania; 2. Beverly Manor of Reading, Mt. Penn, Pennsylvania; 3. Caledonia Manor, Fayetteville, Pennsylvania: The notice at this facility shall not contain the language referring to rules 1.6. and .4. Camp Hill Care Center, Camp Hill, Pennsylvania; 5. Carpenter Care Center, Tunkhannock, Pennsylvania; 6. Clarion Care Center, Clarion, Pennsylvania; 7. Fayette Health Care Center, Uniontown, Pennsylvania; 8. Franklin Care Center, Wayneburg, Pennsylvania; 9. HAIDA Manor, Hastings, Pennsylvania; 10. Meadville Care Center, Meadville, Pennsylvania; 11. Meyersdale Manor, Meyersdale, Pennsylvania; 12. Richland Manor, Johnstown, Pennsylvania; and 13. York Terrace Nursing Center, Pottsville, Pennsylvania.

[62] 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."

[63] 1. Blue Ridge Haven Convalescent Center-West, Camp Hill, Pennsylvania; 2. Mt. Lebanon Manor Convalescent Center, Pittsburgh, Pennsylvania; 3. Murray Manor Convalescent Center, Murraysville, Pennsylvania; 4. Stroud Manor, Stroudsburg, Pennsylvania; and 5. William Penn Nursing Center, Lewistown, Pennsylvania.

[64] See fn. 62, supra.

APPENDIX A

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.

WE WILL NOT issue to employees represented by Service Employees International Union, Local 585, AFL–CIO, revised disciplinary rules without first giving Local 585 an opportunity to bargain concerning the rules.

WE WILL NOT promulgate or maintain rule 1.4 or rule 1.6.

WE WILL NOT reduce the working hours of employees represented by Local 585 without first giving Local 585 an opportunity to bargain concerning the reduction of hours.

WE WILL NOT issue revised job descriptions for, or change the job duties of, licensed practical nurses represented by Local 585 without first giving Local 585 an opportunity to bargain concerning the job description and job duties.

WE WILL NOT suspend or otherwise discriminate against Oneita Say or any other employee because they engage in protected union activity.

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

WE WILL rescind the unlawfully implemented revised disciplinary rules.

WE WILL rescind rule 1.4 and rule 1.6.

WE WILL rescind the unlawful reduction in working hours and WE WILL restore the working hours for employees to what they were prior to the unlawful reduction.

WE WILL rescind the unlawfully issued revised job descriptions and job duties.

WE WILL, in the manner described in the remedy section of this decision, within 14 days from the date of this Order, offer employees entitled to reinstatement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge or discipline, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge or discipline will not be used against them in any way.

BEVERLY ENTERPRISES–PENNSYLVANIA, INC.

APPENDIX B

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.

WE WILL NOT promulgate or maintain rule 1.4 or rule 1.6.

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

WE WILL rescind rule 1.4 and rule 1.6.

WE WILL, in the manner described in the remedy section of this decision, within 14 days from the date of this Order, offer employees entitled to reinstatement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge or discipline, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge or discipline will not be used against them in any way.

BEVERLY ENTERPRISES–PENNSYLVANIA, INC.

APPENDIX C

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.

WE WILL NOT issue to employees represented by Service Employees International Union, Local 668, AFL–CIO, CLC, revised disciplinary rules without first giving Local 668 an opportunity to bargain concerning the rules.

WE WILL NOT promulgate or maintain rule 1.4 or rule 1.6.

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

WE WILL rescind the unlawfully implemented revised disciplinary rules.

WE WILL rescind rule 1.4 and rule 1.6.

WE WILL, in the manner described in the remedy section of this decision, within 14 days from the date of this Order, offer employees entitled to reinstatement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge or discipline, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge or discipline will not be used against them in any way.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC.

APPENDIX D

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.

WE WILL NOT promulgate or maintain rule 1.4 or rule 1.6.

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

WE WILL rescind rule 1.4 and rule 1.6.

WE WILL, in the manner described in the remedy section of this decision, within 14 days from the date of this Order, offer employees entitled to reinstatement full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge or discipline, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge or discipline will not be used against them in any way.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC.