**Brockton Hospital *and* Massachusetts Nurses Association.** Cases 1–CA–35136 and 1–CA–35875

May 11, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On March 25, 1999, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, answering briefs, and reply briefs.[1]

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,[2] and conclusions[3] as modified and to adopt the recommended Order as modified.[4]

1. For the reasons stated by the judge, we agree that the Respondent violated Section 8(a)(1) by prohibiting the distribution of union literature in the vestibule adjacent to its front lobby.[5] The General Counsel has excepted to the judge's failure to address a separate complaint allegation that the Respondent prohibited such distributions anywhere on its premises. In support of this exception, the General Counsel cites testimony by employees Terry Corcoran, Rinette Nadeau-Bates, Barbara Cooke, and Carolyn Anderson that they were told, by supervisors and agents of the Respondent, that they could not distribute their literature on hospital property. This testimony was disputed by the Respondent's witnesses, who testified that they only directed employees to stop distributing the disputed literature in the vestibule.

The judge did not explicitly address this complaint allegation in his decision. However, the judge did note that there was a question in this case whether the nurses had "been told that they could not distribute the literature on Hospital premises." After noting the existence of this issue, the judge proceeded to find that Nurse Manager McArthur told Corcoran and Nadeau-Bates to "cease and desist' from handing out literature *in the front vestibule*." (Emphasis added.) Likewise, the judge found that the Respondent's president, Norman Goodman, told Barbara Cooke and Anderson "that they could not distribute literature *in the vestibule"* without a court order. (Emphasis added.) In these circumstances, we find that the judge implicitly credited the testimony of the Respondent's witnesses over that of the General Counsel's witnesses with respect to this issue.[6] Accordingly, in the absence of any credited testimony that the Respondent banned all distribution of the disputed literature on its premises, we shall dismiss this complaint allegation.

2. The judge found, inter alia, that the Respondent violated Section 8(a)(1) by maintaining an overly broad no-solicitation/no-distribution policy in its 1994 Associate Handbook. That policy, in full, provides that

> Associates shall not canvass, solicit, or distribute literature for any purpose during an associate's working time or the working time of the associate at whom such activity is directed.
>
> Working time is defined as those periods in which an associate is scheduled or assigned for duty. It does not include authorized lunch time.
>
> Canvassing, soliciting or distributing literature may not occur at any time in patient rooms, halls and corridors used by patients, treatment areas, patient lounges and other areas where patients receive treatment.
>
> Canvassing, soliciting or distributing literature on hospital premises by non-associates is prohibited.

In his decision, the judge addressed only the first two paragraphs of this policy. The judge found that this language was overly broad because it does not specifically exclude

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

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

[3] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining an overly broad confidentiality policy, which is cited at sec. III,D, par. 1, of his decision, we do not pass on the judge's suggested revisions to that policy.

In adopting the judge's recommended dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(3) and (1) by its 1997 performance appraisal of employee Terry Corcoran, in sec. III,G of his decision, we rely additionally on the undisputed testimony by Nurse Manager Mary Christian that Corcoran's overall evaluation of "meets expectations" was not affected by the fact that she was rated "needs improvement" in the two areas of "may perform work of a higher level in preparation for increased responsibilities" and "may be assigned additional responsibility in absence of Nurse Manager," out of 41 separate evaluation elements.

[4] We have modified the judge's recommended Order to more closely reflect the violations found and have issued a new notice to employees.

[5] The judge also found, and we agree, that the Respondent violated Sec. 8(a)(1) by prohibiting the distribution of union literature outside of the BKB and outpatient/emergency entrance.

[6] Further supporting the judge's implicit credibility determinations, the Respondent's May 7, 1997 memorandum to the Union concerning the literature distributions states that "[w]e have asked you not to distribute literature *where patients access the building.*" (Emphasis added.)

breaktimes from the definition of working time. We do not agree with this finding.

In *Our Way, Inc.,*[7] the Board held that a rule against solicitation or distribution of literature during "working time" is presumptively lawful, and will not be condemned as ambiguous merely because the term "working time" is not expressly defined for employees. Thus, the term "working time" "connotes periods when employees are performing actual job duties, periods which do not include employees' own time such as lunch and break periods."[8] In *Jay Metals,*[9] the Board found that the employer's rule prohibiting solicitation and distribution of literature during "working time" was lawful even though the employees took short breaks as their work schedule permitted and were paid for their lunch and breaktime. The Board recognized that,

> [t]o the extent, however, that the Respondent releases employees from their duties for lunch or other breaks, it would be inconsistent with *Our Way* to infer that the Respondent's no solicitation/no distribution rule would apply to such periods—or that employees might reasonably think that it did—merely because employees are paid for such periods or because the breaks are informally scheduled and may not overlap with the breaks of other employees.[10]

Consistent with these principles, we find that, under the circumstances of this case, the Respondent's employees likewise would not reasonably believe that the prohibition against solicitation or distribution of literature during "working time" would apply to break periods merely because the policy specifically excludes "authorized lunch time" but does not also specifically mention "breaktimes."

As noted above, the judge addressed only the first two paragraphs of this policy in his decision. In agreement with the General Counsel's exceptions, we hold that the third paragraph of the policy is overly broad insofar as it prohibits any solicitation or distribution of literature in "halls and corridors used by patients." The judge found that substantially identical language, in the Respondent's administrative policy manual, violated Section 8(a)(1) because its blanket prohibition extends beyond immediate patient care areas.[11] We adopt this finding, for the reasons stated by the judge, and we find the similar prohibition, in the associate handbook, against solicitation or distribution of literature in "halls and corridors used by patients" likewise violates Section 8(a)(1).

Our dissenting colleague acknowledges that the Respondent's no-solicitation/no-distribution policies are unlawful under well-established precedent. The dissent argues that the Board should overrule that precedent and allow hospitals to prohibit solicitation and distribution "in areas where patients, their families, and visitors spend a substantial amount of time." In the dissent's view, such prohibitions—including the Respondent's policies set forth above—are presumptively lawful because solicitation or distribution of literature in those areas could interfere with a hospital's ability to care for its patients.[12]

We adhere to the Board's established precedent. Under that precedent, a hospital's prohibition of solicitation or distribution of literature in immediate patient care areas, even during employees' nonworking time, is presumptively lawful.[13] Restrictions on solicitation, during nonworking time, or distribution of literature, during nonworking time and in nonworking areas, however, are presumptively unlawful even with respect to areas that may be accessible to patients.[14] The Supreme Court has upheld these presumptions as consistent with the Act,[15] and we find no support in the record of this case for departing from these well-settled principles.

We stress that what is at issue is the facial validity of the Respondent's policies. As set forth above, the associate handbook and the revised administrative policy manual ban any solicitation or distribution of literature in areas beyond those which the Board has found to be immediate patient care areas. On its face, the revised administrative policy manual would even place off limits all areas of the hospital used by patients, however infrequently, including the Respondent's gift shop and cafete-

[7] 268 NLRB 394 (1983).

[8] Id. at 395.

[9] 308 NLRB 167 (1992), enfd. 12 F.3d 213 (6th Cir. 1993) (per curiam).

[10] Id. at 168.

[11] The judge stated, at sec. III,C, par. 7, of his decision, that the policy, as set forth in the administrative policy manual, is overly broad because "If the hallway, corridor or area used by patients, families or visitors is not deemed an 'immediate patient care area,' then solicitation cannot be banned. If the hallway, corridor or area used by patients, families or visitors is not a work area, then distribution cannot be banned."

[12] Our colleague cites to testimony in this case tending to show that the nature of health care is changing, and that patients' health and medical treatment may be adversely affected by increased levels of stress and by a lack of trust between patients and medical professionals. The dissent asserts, in essence, that patients, their families, and visitors, must be broadly shielded from "union organizational campaigns," which often involve "controversy, heated debate, and talk of strikes and industrial strife," all of which could affect patients' stress levels and diminish their trust in their caregivers.

[13] See *St. John's Hospital,* 222 NLRB 1150–1151 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1977); *Eastern Maine Medical Center,* 253 NLRB 224, 225–226 (1980), enfd. 658 F.2d 1 (1st Cir. 1981).

[14] Id.

[15] *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 507 (1978).

ria and its vestibule area. The Board has, with court approval, consistently found that such sweeping limitations on employees' Section 7 rights are facially unlawful.[16] Our colleague appears to concede that the Respondent's policies would be presumptively unlawful under his approach as well.[17]

We of course agree with our colleague that an "atmosphere of serenity" is a desirable goal in the hospital setting. The Board's presumptions regarding restrictions on solicitation and literature distributions by hospital employees reflect a careful consideration of the interests of patients, as balanced against the interest of employees to exercise their Section 7 right "effectively to communicate with one another regarding self-organization at the jobsite."[18] As the Supreme Court has recognized,

> Here, as in many other contexts of labor policy, "[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."[19]

The balance struck by the Board has stood the test of time, and we are not persuaded that there is any need to reexamine that balance for the purpose of deciding this case.

3. For the reasons stated by the judge, we agree that the Respondent violated Section 8(a)(1) by removing a handwritten notice posted by employee Wendy Baron on her locker concerning an upcoming union meeting at Baron's home.[20] The judge additionally found that the Respondent violated Section 8(a)(1) when Supervisor Carla McRae told Baron that the handwritten notice was "unprofessional." Contrary to the judge, we find no evidence to support a finding that this comment reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Baron testified that McRae told her that she should have had the notice professionally prepared and then submitted it to McRae, or Supervisor Sue Davis, who would determine whether, and where, it could be posted. Viewed in context, we find that this comment refers only to the fact that the notice was handwritten, rather than professionally prepared, and cannot reasonably be construed as a charac-

[16] See *NLRB v. Baptist Hospital,* 442 U.S. 773, 786–787 (1979) (affirming Board's order insofar as it found that ban on solicitation and literature distribution in "any area of the hospital which is accessible to or utilized by the public" was unlawful with respect to the hospital's first floor cafeteria, gift shop and lobbies); *Beth Israel Hospital v. NLRB,* supra (rule banning solicitation or distribution of literature in all public areas violated Sec. 8(a)(1)); *Eastern Maine Medical Center*, supra (rule banning solicitation except during breaktime in nonwork areas was facially invalid and violated Sec. 8(a)(1)); and *St. John's Hospital*, supra (rule banning solicitation in all areas to which patients and visitors have access was facially invalid and violated Sec. 8(a)(1)).

*Intercommunity Hospital,* 255 NLRB 468, 470–474 (1981), cited by the dissent, is fully consistent with the principles articulated above. In that case, the employer maintained a no-solicitation policy, which provided that

> Employees may not solicit or distribute literature, for any purpose, during working time. Employees may not solicit or distribute literature, at any time, for any purpose, in immediate patient care areas.

The Board found that the policy was facially lawful, and that, in the particular circumstances of that case, the employer had lawfully applied the policy to its halls and corridors and to its lobby and waiting room. The Board was not faced with a sweeping ban on solicitation and literature distribution of the character present in this case. Likewise, the Board is not presented, in this case, with the question of whether the Respondent could lawfully have applied a facially lawful policy to prohibit solicitation or distribution of literature in its hallways and corridors. Cf. *Intercommunity Hospital*, supra at 472 (halls and corridors adjacent to patient rooms, operating rooms, x-ray rooms, and other immediate patient care areas are extensions of immediate patient care areas in which solicitation presumptively may be prohibited).

[17] In *NLRB v. Baptist Hospital,supra,* the Supreme Court declined to enforce the Board's order insofar as it prohibited the Respondent from maintaining rules restricting solicitation and literature distribution in its corridors and sitting rooms on patients' floors. The Board's Order in this case does not contain any of the provisions found objectionable by the Supreme Court in *NLRB v. Baptist Hospital.* Accordingly, the Supreme Court's criticism of that aspect of the Board's approach to solicitation and distribution of literature in hospitals, cited by the dissent, has no bearing on the issues presented in this case.

[18] *Beth Israel Hospital v. NLRB,* supra, 437 U.S. at 491. See also *St. John's Hospital,* supra, 222 NLRB at 1151 ("[o]n balance, the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation").

[19] *Beth Israel Hospital v. NLRB,* supra at 501 (quoting *NLRB v. Teamster Local 449,* 353 U.S. 87, 96 (1957)).

[20] We do not, however, adopt the judge's statement that all of the parties conceded that the practice at the hospital was that union meeting notices could be posted in the locker room but that the person posting it needed permission from management. The Respondent's administrative policy manual provides that employees must obtain approval from the Respondent's management before posting information on department bulletin boards or common area bulletin boards. However, and consistent with the position of the General Counsel and the Union, the testimony credited by the judge clearly establishes that, in practice, "all sorts of material was posted on lockers without prior permission and were not removed by management."

As discussed in the judge's decision, art. VI of the 1994–1997 collective-bargaining agreement between the Respondent and the Union provided that the Respondent "will provide space on a bulletin board for posting notices of Association meetings for nurses covered by the Agreement. Copies of such notices shall be submitted to Vice President of Human Resources or his designee prior to their being posted." Pursuant to this clause, the Respondent provided the Union with access to a bulletin board in its cafeteria. The judge found, and we agree, that neither the plain language of this clause nor the record evidence concerning the parties' practice under the clause supports the Respondent's contention that the clause has any applicability to the posting of union meeting notices, by individual employees, on an employee's locker in employee locker rooms.

terization of Baron's union activities as unprofessional.[21] While McRae's opinion concerning the appearance of Baron's notice may have been gratuitous, as the judge found, there is no basis, under the circumstances of this case, for concluding that it thereby violated Section 8(a)(1).[22]

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 3(d).

"(d) When it discriminatorily enforced a policy of removing union notices from a nurse's locker while permitting other material to be posted on nurses' lockers."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Brockton Hospital, Brockton, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(d).

"(d) Discriminatorily enforcing a policy of removing union meeting notices from nurses' lockers while permitting other material to be posted on nurses' lockers."

2. Substitute the following for paragraphs 2(a) and (b), respectively.

"(a) Rescind the unlawful portions of its administrative policy manual, its associate's handbook, the May 7, 1997 memorandum of Cheryl Barrows, and any other written directives which prohibit solicitation during non-working time in nonpatient care areas of the hospital and/or which prohibit distribution during nonworking time in nonworking, nonpatient care areas of the hospital.

"(b) Rescind the unlawful portions of the confidentiality clause in its associate handbook."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

My colleagues conclude that the Respondent violated Section 8(a)(1) of the Act by prohibiting solicitation or distribution of literature in any halls, corridors, or other areas used or accessed by patients, families, or visitors. I disagree in substantial part.

The judge aptly summarized the current state of Board law regarding the *places* of solicitation and distribution in hospitals:[1]

> In summary, therefore, an employer may ban solicitation in "immediate patient care areas" but not working areas. However, in the case of distribution, the employer's rights broaden to permit a ban in both working areas and "immediate patient care areas." If an employer bans distribution or solicitation in a non-work, non-immediate patient care area, it bears the burden of proving that such prohibition is necessary to avoid patient disruption.

In my view, these principles are premised on an overly narrow concept of how hospitals provide treatment and care to their patients. I would revise the Board's principles to allow prohibitions of solicitation and distribution in areas where patients, their families, and visitors spend a substantial amount of time.

In *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), the Supreme Court upheld the Board's presumption that a hospital may lawfully prohibit solicitation and distribution in immediate patient care areas and in areas where it can show that such a ban is necessary to avoid disrupting care or disturbing patients. In doing so, the Court stated:

> [The] Board [bears] a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact in jeopardy.

Id. at 508.

In *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979), the Court specifically questioned the Board's presumption that a ban on solicitation in corridors and sitting rooms is unlawful. The Court did not resolve the issue because it found that the presumption was rebutted in that case. However, the Court's language is instructive. The Court said:

> Because the evidence presented by the Hospital in this case is sufficient to rebut the Board's presumption as applied to corridors and sitting rooms on patients' floors, we need not here decide the rationality of this portion of the Board's presumption,

[21] Baron testified that she understood McRae's comment as a reference to the fact that the notice was handwritten.

[22] In light of our finding that this complaint allegation should be dismissed on the merits, we do not pass on the judge's finding that the allegation, which was not contained in any timely charge, was not untimely under Sec. 10(b) of the Act because it was closely related to a timely charge under the principles set forth in *Redd-I, Inc.,* 290 NLRB 1115 (1988).

[1] This case does not involve the separate issue as to the *times* for solicitation and distribution.

> nor undertake the task of framing the limits of an appropriate presumption regarding the permissibility of union solicitation in a modern hospital. Indeed, the development of such presumptions is normally the function of the Board. It must be said however, that the experience to date raises serious doubts as to whether the Board's interpretation of its present presumption adequately takes into account the medical practices and methods of treatment incident to the delivery of patient-care services in a modern hospital.

Id. at 789.

The Court also said:

> The Board, in reviewing the scope and application of its presumption, should take into account that a modern hospital houses a complex array of facilities and techniques for patient care and therapy that defy simple classification. Patients not undergoing treatment at the moment are cared for in a variety of settings—recovery rooms, intensive-care units, patients' rooms, wards, sitting rooms, and even corridors, where patients are often encouraged to walk, or to visit with their families.

In terms of result reached, the *Baptist Hospital* Court found a ban lawful in areas where patients visit with families and friends and where the patients' families and friends confer with doctors. Id. at 784. See also *Intercommunity Hospital*, 255 NLRB 468 (1981) (solicitation ban lawful in lobby used by staff for conferring with family and friends of patients).

Consistent with the Court's pronouncements and in light of current concepts of medical care, I have reviewed current NLRB principles. As set forth below, I am persuaded that hospital patients benefit from an atmosphere of serenity and well being, and their friends and loved ones can help the healing process if they are secure in the knowledge that the hospital offers such an atmosphere.

The record evidence shows the changing nature of health care, a change that is attributable in part to the prominent role now played by health maintenance organizations and managed care facilities. As the Respondent points out, there is a heightened awareness on the part of medical professionals that: the level of trust between a patient and a medical professional is an important element in the success (or failure) of treatment; increased levels of stress and anxiety in patients are linked to deteriorations in their health; and, the overall emotional and psychological state of a patient can greatly affect the patient's ability to recover from illness.

I believe that union organizational campaigns often involve controversy, heated debate, and talk of strikes and industrial strife. Indeed, it is for this reason that hospitals can ban union activity in areas of immediate patient care. My difference with my colleagues is that I would permit a ban in other areas as well. In this regard, the Board should take into account, and give due weight to, the fact that hospitals provide care to patients in more locations than those circumscribed by what the Board calls "immediate patient care areas." The Board should also recognize that conduct affecting families and visitors of patients can affect the state of mind, and therefore the well being, of patients. In light of its unique setting, and the extremely high stakes involved (often literally a matter of life or death), I would presumptively allow a hospital to enforce most of the prohibitions at issue here. I also note that, in the instant case, the material distributed was replete with hospital "horror stories" likely to prove extremely upsetting to any patients, families, or visitors who encounter them.

My colleagues state that the balance struck by the Board in this area of the law has stood the test of time. This is certainly true in the sense that the Board has declined to abandon or modify the presumptions at issue. However, the question is whether the times have changed so that the Board should reevaluate its policies, just as the Supreme Court has suggested it should. As explained above, I believe that the Board should do so.

I wish to stress that my position does not unreasonably restrict Section 7 communications among employees. There are myriad opportunities for such communications. For example, employee break areas, cafeterias, and vestibules offer ample opportunities for such activity. In addition, employees can, of course, converse away from the hospital, as well as in parking areas as they come to and from work. Given these alternative means of communication, I believe that, on balance, the extremely important interest of patient welfare outweighs the interest of granting additional areas for employee communication.

Consistent with my views set forth above, I would find presumptively unlawful a prohibition of solicitation and distribution in the vestibule and in the cafeteria. As set forth above, I would presumptively permit a prohibition on solicitation and distribution "in areas where patients, their families and visitors spend a substantial amount of time." The vestibule is not such a place. It is essentially a place where people pass through from one place to another. Similarly, a hospital cafeteria is ordinarily a place that is used on a transient basis, i.e., a place to which families and other visitors can go briefly while at the hospital visiting patients. In addition, the cafeteria is generally open to the general public, just as any eating

establishment would be. Accordingly, I would presumptively permit solicitation and distribution to occur there.

In view of the above, some of Respondent's policies may be presumptively unlawful. For example, the revised Administrative Policy Manual bars solicitation and distribution in "areas used by patients, families or visitors." To the extent that this covers the cafeteria and vestibule, the policy would be presumptively unlawful.[2]

## APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate or maintain overly broad no- solicitation or no-distribution rules.

WE WILL NOT promulgate or maintain overly broad confidentiality rules.

WE WILL NOT refuse to permit employees to distribute literature concerning terms and conditions of employment to other employees in nonworking, nonpatient care areas of the hospital during the nonworking time of the employees involved.

WE WILL NOT enforce rules regarding solicitation, distribution, and the posting of materials within the facility in a discriminatory manner.

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

WE WILL rescind the unlawful portions of our administrative policy manual, our associate handbook, the May 7, 1997 memorandum of Cheryl Barrows, and any other written directives which prohibit solicitation during nonworking time in nonpatient care areas of the hospital and/or which prohibit distribution during nonworking time in nonworking, nonpatient care areas of the hospital.

WE WILL rescind the unlawful portions of the "confidentiality policy" in our associate handbook, which prohibit our employees from discussing wages, hours, or other terms and conditions of employment with each other or with their collective-bargaining representative.

[2] My colleagues suggest that I concede that the Respondent's policies would be presumptively unlawful under my approach. However, as explained above, I do so only to the extent that those policies would bar solicitation and distribution in the cafeteria and vestibule.

## BROCKTON HOSPITAL

*A. Susan Lawson, Esq.*, for the General Counsel.

*Arthur Murphy, Robert H. Morsilli,* and *David Powilatis, Esqs. (Murphy, Hesse, Toomey & Lehane),* of Boston, Massachusetts, for the Respondent.

*Jack J. Canzoneri, Esq.,* of Newton, Massachusetts, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On April 10 and December 3, 1997, a charge and first amended charge were filed in Case 1–CA–35136 and on December 12, 1997, a charge was filed in Case 1–CA–35875. The Charging Party in each case was the Massachusetts Nurses Association (Union) and the Charged Party was Brockton Hospital (Respondent).

On April 14 and May 20, 1998, the National Labor Relations Board, by the Regional Director for Region 1, issued a consolidated amended complaint and amendment, respectively, alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) when since October 11, 1996, it maintained an overly broad no-solicitation/no-distribution policy and an overly broad policy regarding confidentiality, when on March 20 and 27, 1997, it prohibited employees from distributing union literature at the hospital, when on May 7, 1997, it published an overly broad no-solicitation policy, when it enforced its no-posting rule in a discriminatory fashion, and when it gave its employee, Terry Corcoran, a performance evaluation with unfavorable comments in it and a reduced score in some rated areas.

Respondent filed an answer in which it denied it violated the Act in any way.

Trial was held before me over 8 days between November 2 and 20, 1998.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel, Respondent, and the Charging Party and, on my observation of the witnesses and their demeanor, I made the following

## FINDINGS OF FACT

### I. JURISDICTION

At all material times Respondent, a corporation with an office and place of business in Brockton, Massachusetts, has been engaged in the operation of an acute care hospital.

Respondent admits, and I find, that Respondent meets the Board's jurisdictional standards and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

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

## III. THE UNFAIR LABOR PRACTICES

### *A. Overview*

Brockton Hospital, the Respondent, is an acute care hospital. The Massachusetts Nurses Association, the Union, is a Union, which represents close to 400 registered nurses who work at Brockton Hospital. When I refer in this decision to nurses I mean registered nurses in the unit and not supervisory nurses, licensed practical nurses, or nurse aides. Respondent has recognized the Union as the collective-bargaining representative of its nurses since approximately 1980.

There are a number of unfair labor practices alleged in this case and for the most part they concern the issue of communication between the nurses and their Union and communications between nurses. In other words a good deal of this case deals with issues of solicitation and distribution.

A collective-bargaining agreement between Respondent and the Union was in effect from October 19, 1994, to October 18, 1997.

### *B. Distribution of Union Literature by Nurse Employees to Other Nurse Employees*

In the early part of 1997 the Union began what it called its "safe care campaign."

On March 5, 1997, the Union held a meeting at the union hall. All nurses in the unit were invited to attend. The principal subject matters to be discussed were the "safe care campaign" and the upcoming negotiations for a new contract.

Approximately 100 of the close to 400 nurses in the unit attended the meeting and 40 of them volunteered to help in the "safe care campaign."

The union official most connected with the "safe care campaign" and negotiations for a new contract at Respondent's facility was Stephanie Craig Francis. A former nurse, Francis is a full-time employee of the Union.

Francis credibly testified that because of managed care, which is an approach to health care delivery which places heavy emphasis on efforts to contain costs, changes were taking place in the nursing profession and in the health care area generally which heavily impacted on nurses. Among the trends in the delivery of health care were the use of nonprofessional staff to do what traditionally had been done by nurses and the fact that managed care had the result of getting patients out of the hospital sooner and that hospital stays for patients were shorter than they had been heretofore. Francis testified, and was corroborated by Respondent's president and chief executive officer, Norman Goodman, that patients in an acute care hospital as a result of managed care had shorter stays in the hospital and were sicker. As a result nurses had to work harder.

Respondent back in 1996 wanted to reduce costs and there was an agreement reached between Respondent and the Union for nurses to voluntarily cut their hours. A number of nurses did. However, the number of patients did not reduce in number as expected and patients in the hospital were sicker and in more need of care and as a result the Union perceived that there would be staffing shortages and more mandatory overtime. The Union perceived that these issues would be brought up at upcoming bargaining sessions for a new collective-bargaining agreement at Brockton Hospital.

The Union wanted to educate the nurses in the unit about trends in the nursing field and also to prepare the nurses for the upcoming negotiations for a new contract later in the year. These trends were nationwide trends and not peculiar to Brockton Hospital or even New England.

Beginning on Thursday, March 20, 1997, and continuing for the following nine Thursdays nurses handed out literature at the hospital. The distribution was done on Thursdays, which was payday. The distributions were to be done at the three shift changes, i.e., around 7 a.m., 3 p.m., and 11 p.m. For a period of 15 minutes or so before and for 15 minutes or so after the three shift changes the nurse volunteers would hand out literature to incoming and outgoing nurses. The nurses passing out the literature and those receiving the literature would all be off duty at the time of the distribution.

The literature was to be offered only to members of the unit and not to doctors, nurse supervisors, or other hospital staff. The literature was not to be offered to patients, family members of patients, friends of patients, vendors doing business at the hospital, or visitors. If the nurse distributing the literature knew the person as a nurse in the unit the nurse could be given the literature. If the nurse distributing the literature did not know the person they were to make sure it was a nurse in the unit before they were to distribute the literature to that person. The nurses handing out the literature and those receiving it were all employees of Respondent.

The dates of distribution were:

(1) March 20, 1997
(2) March 27, 1997
(3) April 3, 1997
(4) APRIL 10, 1997
(5) April 17, 1997
(6) April 24, 1997
(7) May 1, 1997
(8) May 8, 1997
(9) DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD
May 15, 1997
(10) May 22, 1997

Copies of the literature distributed was received in evidence as General Counsel's Exhibits 10(a–k).

Stephanie Craig Francis credibly testified that the literature was to be distributed just to nurses in the unit by the unit employee nurses in order to educate the nurses about trends in the nursing profession *and* to prepare the nurses for upcoming negotiations for a new contract. Nurses Tina Russell, Barbara Cooke, Carolyn Anderson, Rinette Nadeau-Bates, Terry Corcoran, and Linda Guild, all of whom distributed literature, credibly corroborate Francis as to the reasons for the distribution.

On March 20 and 27, 1997, the nurses distributing literature in the front vestibule of the main entrance to the hospital were told they could *not* distribute literature at that location. Indeed they may have been told that they could not distribute the literature on Hospital property.

On March 20, 1997, it was Nurse Manager Michelle McArthur who told nurses Terry Corcoran and Rinette Nadeau-

Bates that they must "cease and desist" from handing out literature in the front vestibule.

On March 27, 1997, it was Respondent's president and chief executive officer, Norman Goodman, who told nurses Barbara Cooke and Carolyn Anderson that they could not distribute literature in the vestibule and he added "without a court order." Both Cooke and Anderson testified that Goodman said the literature couldn't be distributed without a court order and Goodman couldn't recall if he said that or not but admits that he said they could not distribute the literature.

Distribution in the vestibule was permitted by Respondent for the remainder of the 10-week campaign but Respondent persisted in its position that nurses can not distribute literature in the vestibule.

The literature consisted of compilations of articles from nursing journals, newspapers, and magazines. The articles address the issues of the adverse effect on patients caused by downsizing and restructuring of nursing staff and the use of nonprofessional employees giving the care and treatment that used to be the sole province of nurses.

The literature distributed contained selected articles from newspapers with headlines such as "A shortcut that killed a patient," "A feeding tube in wrong hands leads to death," "A castrophe waiting to happen," "Tale of 2 hospitals, Children's undertakes reorganization similar to a plan that failed in Dallas," "Hospitals are replacing nurses with lesser-trained, lower-paid aides. Will patients pay the price?" "Who's watching? Hospitals are left on their own in setting standards for aides," "A mistake leads to baby's death," "Nurses take to the courts in fight with hospital's cost-cutting," and "Protecting Patients, curing the ills that cost cuts cause." None of the articles mentioned Brockton Hospital by name and it is agreed by all the parties to this litigation that the articles did not refer to Brockton Hospital as being the hospital where any of the mishaps in the articles happened.

Respondent called three witnesses who credibly testified that if patients or their families saw these articles they could become upset and anxious and it could undermine the trust that should exist between a patient and the medical staff treating the patient and could impact adversely on the patient. The three witnesses were Dr. David Leiman and Dr. Burton Polansky, who are on staff at Brockton Hospital, and nurse consultant and former nurse Anne Cavanaugh who does *not* work at Brockton Hospital but is a consultant. All three reviewed the literature that was distributed and said it could *impact* adversely on patients and family and Dr. Leiman went on to say it could *upset* even the staff at the hospital.

The articles in the literature that was distributed came from nursing journals available to the nurses and from newspapers or magazines available to the general public.

The record reflects that Respondent does *not* censor the TV watched in the hospital by patients and visitors nor does it censor newspapers which contain articles such as the ones contained in the literature distributed by the nurses nor does it censor the nurses bringing into the hospital professional nursing journals which contain articles similar to the ones in the literature distributed by the nurses at Brockton Hospital. Indeed the hospital gift shop itself sells newspapers and magazines containing articles similar to those distributed and a cart is pushed through the hospital and patients and visitors can buy newspapers and magazines from the cart that sometimes carry the same types of articles distributed by the nurses.

Respondent suggested that the Union mail the literature to the nurses and Respondent would furnish free mailing labels. The Union wanted to hand deliver the literature rather than mail it to the nurses because handing it to the nurses would involve interpersonal contact and there would be a greater chance that the nurse would read the material handed him or her than read material received in the mail at home.

Although witnesses for Respondent testified that they would not want this literature to fall into the hands of patients or their families there was not a shred of evidence that any patient or family member saw any of this literature. Robert Nolet, Respondent's director of environmental services, testified that one of his staff, Donna O'Connor, who did *not* testify, gave him some of the literature which, according to Nolet, O'Connor claimed to have picked up in the lobby. The lobby contains couches and chairs and is used by patients and family and visitors. However, there was evidence from Nolet that the lobby was frequently policed by the cleaning staff and there was no evidence any patient or family or visitors ever picked up and read or even saw the literature. The nurses did *not* distribute literature in the lobby but did in the vestibule, which leads into the lobby.

The hospital received no complaints about the literature from any patient or family member of a patient or any visitor to the hospital.

Cheryl Barrows, Respondent's director of human resources, credibly testified she was given copies of the distributed literature gathered by nurse managers in the nurses' locker rooms and lounge areas which were off limits to patients, family members, and visitors.

There was no evidence that any patient was ever disturbed or inconvenienced by the distribution of this literature.

The literature was handed out at three locations, i.e., at the front entrance of the hospital and inside the vestibule, outside the rear entrance of the hospital also called the BKB entrance, or Barbara Keith Building entrance, and the emergency/outpatient entrance. All distribution was done outside the hospital except the distribution in the front vestibule. The front vestibule is a self-contained area between the lobby and the outside entry at the front of the hospital. There are a pair of automatic doors heading into the vestibule from the outside and another pair leading into the lobby of the hospital.

Respondent argues that the vestibule is a work and/or patient care area. A security guard is posted in the lobby and can look into the vestibule. The guard on occasion will walk through the vestibule or stand in it but he will also patrol areas outside the hospital such as the parking lots. The vestibule contains two benches on which patients, family, visitors or staff are permitted to sit. Outside the vestibule are some more benches where patients, family, visitors or staff can sit. When a person is discharged from the hospital a member of the transportation department will take the patient by wheelchair through the vestibule and to the curb outside the hospital and help the patient into the car taking the patient home. Discharges are fairly

common but not constant. There are virtually no discharges at the time of the first and third shift changes, i.e., 7 a.m. and 11 p.m.

Respondent also claims that doctors sometimes chat with a patient's family member in or just outside the vestibule.

There is also a fire alarm in the vestibule, which is periodically serviced.

None of these activities could be called patient care activities. The vestibule and the other areas where the literature was distributed are not operating rooms or patient rooms. They are simply not patient care areas and not even work areas as that phase would be commonly understood as further discussed below. Interestingly enough Respondent was unaware that nurses distributed literature outside the BKB or rear entrance or outside the emergency/outpatient entrance. The nurses did *not* distribute literature by the ambulance bay to the emergency entrance.

The subject matter of the literature that was distributed clearly involved issue of terms and conditions of employment and even if some of the literature touched on political issues it was appropriate and lawful material to be distributed by the Union to the employees it represents. See, e.g., *Eastex Inc. v. NLRB*, 437 U.S. 556 (1978), where the Supreme Court agreed with the Board that a company violated Section 8(a)(1) of the Act by prohibiting distribution of a newsletter which urged employees to write their legislators to oppose incorporation of the state "right-to-work" statute into a revised state constitution, criticized a presidential veto of an increase in the federal minimum wage, and urged employees to register to vote and "defeat our enemies and elect our friends." Clearly the literature distributed at Brockton Hospital concerned terms and conditions of employment. Section 7 rights encompass "mutual aid or protection" and reducing the number of nurses by using non professionals to do their work and the whole issue of sicker patients and its impact on nurses are matters of working conditions critical in importance to nurses.

Board precedent establishes the scope of an employer's right to promulgate rules limiting the rights of employees in soliciting and distributing materials at the workplace. The Board's rules in that regard may be summarized as having three key aspects, as follows.

First, an employer is permitted to restrict employees from soliciting or distributing while working (on worktime) to the extent that the employer enforces such prohibition on an even-handed basis for all types of distribution and solicitation. Thus, absent discriminatory enforcement, an employer is within its rights under the Act to require that all solicitation and distribution occur while an employee is not on worktime. *St. John*'s *Hospital,* 222 NLRB 1150 (1976); *Beth Israel Hospital*, 223 NLRB 1193 (1976), enfd. 554 F.2d 477 (1st Cir. 1977), affd. 437 U.S. 483 (1978) (applying and upholding the Board's rule as established in *St. John*'s *Hospital*); *NLRB v. Baptist Hospital,* 442 U.S. 773, 778 fn. 8 (1979) (same).

Second, in the context of hospitals, an employer is presumptively allowed to ban solicitation and distribution in—what the Board and Courts refer to as—immediate patient care areas, "such as patients' rooms, operating rooms, and treatment rooms as areas of immediate patient care." *Baptist Hospital*, 442 U.S. at 780 (quoting *St. John*'s *Hospital*, 222 NLRB at 1150). An upshot of this is that if a union in a hospital setting wishes to engage in solicitation or distribution in "immediate patient care areas" it bears the burden of proving that such access should reasonably be granted to its members or that the rule at issue is enforced discriminatorily against union activity. *St. John*'s *Hospital*, 223 NLRB 1193.

Third, the Board has established different rules with respect to solicitation and distribution in so-called "working areas." On the one hand, an employer is presumptively permitted to ban distribution (but not solicitation) in "working areas," and a union may establish the right to distribute in a working area only if it proves that such access should reasonably be granted or that the distribution ban is enforced discriminatorily against union activity. On the other hand, an employer is presumptively prohibited from banning solicitation in working areas, and an employer who imposes such a restraint does so unlawfully unless it proves that its banning of solicitation in working areas was necessary to avoid patient disruption.

In summary, therefore, an employer may ban solicitation in "immediate patient care areas" but not working areas. However, in the case of distribution, the employer's rights broaden to permit a ban in both working areas and "immediate patient care areas." If an employer bans distribution or solicitation in a nonwork, nonimmediate patient care area, it bears the burden of proving that such prohibition is necessary to avoid patient disruption.

The front vestibule and the area outside the front entrance are not "immediate patient care areas." Again, the distribution was by members of the unit all of whom were employees of Respondent to other unit employees only. Near the BKB or rear entrance was a gazebo where patients and staff could smoke since the interior of the hospital itself was a smoke free zone. Needless to say, the area where patients and staff smoked is not an "immediate patient care area."

Board precedent has long held that merely because a work function or functions occur in a given space does not render that space a "work area" within the meaning of the Board's rules regarding distribution. Rather, the Board has looked at the quality and quantity of work, which occurs in the area at issue, and examines whether the work is more than de minimus and whether it involves production. Thus, for example, in *United States Steel Corp.*, 223 NLRB 1246 (1976), the Board considered whether an entire facility and grounds could be considered a work area and found that it could not.[1] Also, in

[1] The Board held:

> Respondent contends first that all property at the South Works and Gary Works constitutes a work area from which distribution of literature may be properly prohibited. The General Counsel counters that this contention is wrong based on the fact that the property consists of thousands of acres, which include large parking areas, roadways, walkways, and open spaces between the various structures on the land. The buildings themselves contain lockerrooms, restrooms, lunchrooms, and vending machine areas. Such places have been found by the Board to be nonwork areas. See *Plant-City Steel Corporation,* [138 NLRB 839 (1962), enfd. 331 F.2d 1231 (6th Cir. 1964)] (parking lots, street passageways, and sidewalks on plant premises very similar

*United States Steel Corp.* the Board considered whether an area was a "work area" within the meaning of the Act by virtue of, inter alia, the presence of guards patrolling the area, and other nonproduction workers such as janitors performing work in such area and held that these duties, performed in such area, did not render it a "work area" within the meaning of the Act, reasoning as follows:

> The Respondent raises the additional point that because nonproduction employees, such as janitors and security workers, perform some tasks in nonwork areas; these locations are converted into working areas for the purpose of banning distributions. In *National Steel Corporation*, [173 NLRB 401 (1968), enfd. 415 F.2d 1231 (C.A. 6, 1969)], under a similar statement of facts, the existence of security guards did not convert the parking lot, streets, passageways, and sidewalks into working areas as Respondent contends. In primarily nonworking areas the element of protecting the production process is not present. Whether employees are distributing literature or doing other nonwork functions like washing up, loitering, or eating, on their own time in areas designated for these purposes makes no difference to production or the tasks performed by employees in these nonwork areas. *Respondent*'s *contention that all its property is a work area is a contention that can be asserted by every company, thus effectively destroying the right of employees to distribute literature. Some work tasks, whether it be cleaning up, maintenance, or other incidental work, are performed at some time in almost every area of every company*. [Emphasis added.]

Board precedent in the context of hospitals establish a similar stance, rejecting the notion that a space is an "immediate patient care area" or even a "work area" merely because there is the limited activity of transporting patients through a doorway, upon discharge. See *Medical Center Hospitals*, 244 NLRB 742 (1979).

The Board has not given a comprehensive definition as to what constitutes an "immediate patient care area," *Baptist Hospital*, 442 U.S. at 780, but in *St. John*'s *Hospital*, 222 NLRB 1150 (1976), enfd. granted in part and denied in part 557 F.2d 1368 (10th Cir. 1977), the Board held that immediate patient care areas are not just anywhere in the Hospital where a patient happens to appear but rather, more narrowly, areas "such as the patients' rooms, operating rooms, and places where patients received treatment, such as x-ray and therapy areas." 222 NLRB at 1150.

Other Board precedent has found that the front entrance and lobby areas of hospitals are not immediate patient care areas or work areas. *NLRB v. Harper Grace, Inc.*, 737 F.2d 576 (6th Cir. 1984) (front entrance); *NLRB v. Southern Maryland Hospital Center,* 293 NLRB 1209 (1989), enfd. in relevant part 916 F.2d 932 (4th Cir. 1990) (front entrance); *Eastern Maine Medical Center,* 658 F.2d 1 (1st Cir. 1984) (lobby); and *Albert Einstein Medical Center*, 245 NLRB 140 (1979) (vestibule near cafeteria).

Applying the foregoing to the instant case, it may easily be concluded that neither the front vestibule nor the area outside the admitting/outpatient entrance nor the area outside the rear or BKB entrance are work areas or immediate patient care areas and distribution of literature can not be prohibited.

### *C. Overly Broad No-Solicitation and No-Distribution Policy Contained in Respondent's "Associate Handbook" and "Administrative Policy Manual"*

It is alleged in the complaint that Respondent maintained an overly broad no-solicitation/no-distribution policy in both its "Associate Handbook" and its "Administrative Policy Manual."

The "Associate Handbook" was adopted in September 1994 and continues in effect through the trial in this case.

The nurses in the unit are called "Associates" and on page 17 of the associates handbook, in evidence as General Counsel's Exhibit 12, is the following language:

> Associates shall not canvass, solicit or distribute literature for any purpose during an associate's working time or the working time of the associate at whom such activity is directed.
>
> Working time is defined as those periods in which an associate is scheduled or assigned for duty. It does not include authorized lunch time.

This language is overly broad because it does not specifically exclude from the definition of working time "break times." Accordingly, maintaining such a rule was a violation of Section 8(a)(1) of the Act.

Respondent maintained since September 1995 an "Administrative Policy Manual" which contained, in pertinent part, the following language:

> *Associates*
>
> Associates are prohibited from canvassing, soliciting, or distributing literature to other associate [sic]."

This part of the Administrative Policy Manual is in evidence as General Counsel's Exhibit 11. Again, the nurses in the unit are called associates and the above-quoted language is overly broad since it would purport to prohibit distribution of union literature one unit employee to another in nonwork areas and non-patient care areas and purports to prohibit soliciting on nonworking time such as during lunch or during breaks and the maintaining of such an overly broad policy is a violation of Section 8(a)(1) of the Act.

The Respondent attempted to remedy the unlawfulness of the solicitation and distribution policy contained in its administrative policy manual by revising the policy, which was in force at the time the complaint issued. However, the revision dated June 30, 1997, and entitled "Solicitation of Associates" remains overly broad. Respondent's Exhibit 27. In this version, "Associates are prohibited from canvassing, soliciting, or distributing literature to other associates in any areas as defined above for any purpose during the associate's working time or the working time of the associate at whom such activity is directed." Under the Policy section, the following language

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to Respondent's found to be nonworking areas); and *Rockingham Sleep Wear, Inc.,* [188 NLRB 698] (1971)] (production area used as a lunchroom found to be a nonwork area during lunch break). supra at 1247.

the Policy section, the following language appears: "Solicitation or distribution of literature may not occur at any time by associate or outside person in patient rooms, hallways, corridors and areas used by patients, families or visitors, patient lounges, any areas where patients receive treatment, or any work areas." While it is true that a hospital may prohibit all solicitation in "immediate patient care areas," even when the employees involved are not on working time, this policy fails by prohibiting solicitation in any work areas, rather than just those, which are "immediate patient care areas." Employees who are not on working time may engage in solicitation in work areas, provided the work area is not an "immediate patient care area." Also, to the extent that the policy prohibits solicitation or distribution in "hallways, corridors, and areas used by patients, families, or visitors," it is overly broad. If the hallway, corridor, or area used by patients, families or visitors is not deemed an "immediate patient care area," then solicitation cannot be banned. If the hallway, corridor, or area used by patients, families, or visitors is not a work area, then distribution cannot be banned.

Although there is no evidence that any employee was disciplined for violating these policies in the Associate Handbook or administrative policy manual it is clear that such policies in the context of the unfair labor practices in this case should be rescinded.

The associate handbook is furnished to each new nurse and the administrative policy manual is maintained at several locations in the hospital to include nursing stations.

### *D. Unlawful Confidentiality Clause in Respondent*'s "*Associate Handbook*"

The Associate Handbook adopted in September 1994 and continuing in effect contained the following clause at page 17 in General Counsel's Exhibit 12:

> *Confidentiality*
>
> Associate must respect the patient's right to privacy and respect the confidentiality of information regarding patients, associates, or hospital operations. Information concerning patients, associates, or hospital operations should not be discussed either inside or outside the hospital, except strictly in connection with hospital business.

This confidentiality clause is overly broad since it would prohibit nurses from discussing hours, wages, and other terms and conditions of employment with each other or their union representatives unless they are doing so "strictly in connection with hospital business." On its face it is at least ambiguous. Is a discussion between nurses or with their union representative on whether or not to pursue a grievance over a policy at work a discussion "strictly in connection with hospital business" or not?

The confidentiality clause is ambiguous.

Although there was no evidence that any employee was ever disciplined for violating this rule it would have a tendency to cause nurses who read it to believe it restricted his or her right to discuss hours, wages, and other terms and conditions of employment.

Obviously Respondent can promulgate a rule which respects the right of privacy of its patients but should not promulgate a rule which inhibits employees in the exercise of their rights under Section 7 of the Act which rights include the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The confidentiality clause could be amended by adding to it the following language "Nothing in this confidentiality clause should be interpreted to interfere with the rights of associates under Section 7 of the National Labor Relations Act" or by adding language that the confidentiality clause "does not restrict employees in their right to discuss hours, wages, and other terms and conditions of employment."

The maintaining of the confidentiality clause in its present form is a violation of Section 8(a)(1) of the Act. See *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465–466 (1987), and *Indian Hills Care Center,* 321 NLRB 144, 155 (1996), where language similar to that in the instant case was found unlawfully overbroad because it could be construed to prohibit employees from discussing hours, wages, and other terms and conditions of employment.

### *E. May 7, 1997 Memo Regarding Solicitation*

As noted above the distribution of literature by nurses to fellow nurses in the unit began on March 20, 1997, and continued for 10 weeks.

On May 7, 1997, nurse Tina Russell, a member of the unit who was active in the Union, received a memo from Respondent's director of human resources, Cheryl Barrows.

Barrows' memo provided, in pertinent part, as follows:

> We have asked you not to distribute literature where patients access the building, and our position is that such distribution is prohibited and inappropriate. However, we have not taken steps to stop your handbilling. This does not change our position. Since the activity has continued, we want to reiterate our position. We do not allow solicitation of any nature in areas accessed by patients, their families, or visitors. The lobby functions as a patient waiting area. We restrict any activity that is disruptive to patients, family members, and visitors. Any activity that undermines the confidence of the patients that come to Brockton Hospital is not in the best interest of our patients or the community. Our concern is for our patients. They should be able to seek and obtain care in a friendly environment where the sole concern is for their well being.

The prohibition of solicitation of any nature "in areas accessed by patients, their families, or visitors" is overbroad.

Respondent may lawfully prohibit solicitation in immediate patient care areas or in work areas where it can be demonstrated that the solicitation will be disruptive to patient care or disturbing to patients. The blanket prohibition of solicitation in areas merely accessed by patients and their families, or visitors, including the lobby, is overly broad and violative of Section 8(a)(1) of the Act. See *Beth Israel Hospital v. NLRB*, supra.

*F. Incident Involving Posting of Union Literature in August 1997*

The collective-bargaining agreement in effect from October 19, 1994, to October 18, 1997, contained the following language in article VI:

> The Hospital will provide space on a bulletin board for posting notices of Association meetings for nurses covered by the Agreement. Copies of such notices shall be submitted to Vice President of Human Resources or his designee prior to their being posted.

In or about August 1997 nurse Wendy Baron posted a handwritten notice of a union meeting on her locker. Her locker is in one of the nurses' locker rooms and entry into the locker room is limited to staff only. The union meeting was to be held at another nurse's home and was a meeting just for the 16 nurses in that medical unit and not a union meeting for the close to 400 nurses who work at the hospital.

It is uncontested that Administrative Coordinator Carla McRae, an admitted supervisor and agent of Respondent, removed the notice of the union meeting and left the following note for Baron in her mail slot in the locker room:

> Hi Wendy, Union business postings are not to be posted randomly on lockers. You can with my or Susan's permission post notices on the bulletin board.
>
> Susan is another nurse supervisor.

As a result of McRae removing the notice and Baron not knowing she had done so because Baron was off work for several days after posting the notice of the union meeting and as a result knowledge of the meeting did not get circulated among the nurses and only 4 of 16 nurses attended the meeting and two of them were Baron and the nurse at whose house the meeting was to be held.

When Baron spoke with McRae after reading McRae's note to her McRae told Baron that with respect to the Union notice that it was just "slapped together" and that union notices should be put together more "professionally."

It is conceded by all parties to the litigation that the practice at the hospital was that union meeting notices could be posted in the locker room but the person posting it needed permission from management. This is consistent with the collective-bargaining agreement. However, the credible and uncontradicted testimony of numerous nurse witnesses was that all sorts of material was posted on lockers without prior permission and were not removed by management, e.g., girl scout cookie sales, school fund raising notices, pictures, all types of announcements, letters from patients, etc.

It would be unlawful for Respondent to permit all manner of postings on lockers without management permission and require management permission only with regard to union postings. That is the case here and hence I find a violation of Section 8(a)(1) of the Act. See *Lassen Community Hospital,* 278 NLRB 370 (1986).

The offense was compounded by management in the person of McRae telling a union activist that her note was unprofessional. It is none of management's business how professional or unprofessional the notice looks and whether it is typed or handwritten. If the union meeting notice contained obscene language that would be a different story but it did not.

The allegations in the complaint regarding the removal of the notice and the demeaning comments of McRae to Baron were not contained in any charge alleging the conduct as unlawful. These allegations should be dismissed unless I find that they are closely related to the charges that were timely filed. It is my conclusion that, under the rationale of *Redd-I, Inc.,* 290 NLRB 1115 (1988), they are closely related and the allegations will not be dismissed as untimely within the meaning of Section 10(b) of the Act. They are closely related because the entire case involves the issues of communications between the Union and the unit members and among unit members and all of the allegations allegedly occurred in 1997 in the months preceding negotiations for a new collective-bargaining agreement. I do not find that the Union clearly and unmistakably waived any right with respect to this matter by agreeing to the contract language spelled out above because the notice posted by Baron was not a full association meeting but just for a small group and the thrust of the contract language was the duty of Respondent to provide a place for the Union to post union meeting notices.

*G. Unfavorable Comments and Ratings in Performance Evaluation of Terry Corcoran*

In June 1997, Terry Corcoran, a nurse in the bargaining unit who had handed out literature beginning in March 1997, received her annual performance appraisal from her Nurse Manager Mary Christian.

Corcoran had worked at Brockton Hospital for 10 years and had over the years received an overall rating of "2," i.e., meet expectations, and had received a two in all rated categories.

In June 1997, Corcoran again received an overall rating of two, i.e., meets expectations, but received a three, i.e., needs improvement, in the categories of "may perform work of a higher level in preparation for increased responsibilities" and "may be assigned additional responsibility in absence of Nurse Manager." Nurse Manager Mary Christian wrote in the following language "has difficulty performing charge duties."

In addition in the comment section of the performance evaluation form Christian wrote, "Terry is a 24º/wk RN on A4. She is motivated and knowledgeable concerning her role. Her transition from B3 (Resp.) to A4 (a larger unit w ortho/resp. focus) has moved along well. Terry is committed to her profession yet does not always display behavior supportive of the department. Investing time to work within the system, exploring issues from all sides could be of benefit."

On March 20, 1997, Corcoran was involved in an incident with management when she was handing out literature in the vestibule of the hospital. Administrative coordinator Michelle McArthur told Corcoran to "cease and desist" from handing out the literature. McArthur's impression of the encounter in the vestibule is more benign than Corcoran's impression. Nurse Renette Nadeau-Bates supports Corcoran's version of a somewhat angry confrontation between Corcoran, who was insisting on the right to distribute the literature, and McArthur's insistence that she not do so and indeed, "cease and desist" from doing so. I found all women credible but note that based at

least on my observation of Corcoran's demeanor when she testified before me that she can became a little emotional. It is the contention of the General Counsel that Corcoran's encounter with management when Corcoran was engaged in the protected concerted activity of lawful distribution of literature prompted the lower evaluation but I don't agree.

A number of other witnesses who were active for the Union and had encounters with management over the distribution of literature did *not* receive lower evaluations from Christian, e.g., Tina Russell and Barbara Cooke.

In addition, Mary Christian, who evaluated Corcoran, credibly denied that Corcoran's union activities had anything to do with the evaluation.

Christian gave Corcoran two "threes" (needs improvement) because of Corcoran's difficulty in performing charge nurse duties.

It is uncontested that Corcoran told Christian that she (Corcoran) did not like being a charge nurse, i.e., a line nurse who is in charge of the floor during a shift. Christian credibly testified that registered nurses who worked 40, 32, or 24 hours a week, Corcoran was a 24-hour-a-week nurse, were all called upon periodically to be the charge nurse. It is also undisputed that one day when Corcoran had charge duty it was quite busy and Corcoran had a breakdown on the floor. Corcoran broke down in tears and had to see Christian. Corcoran cried again in front of Christian and Christian counseled Corcoran and told her that they should look at the problem and fix it. Based on Corcoran's breakdown and all evidence points to the breakdown occurring in the rated period, it was not unreasonable to write that she had "difficulty performing charge duties" as Christian wrote.

The other comments on the evaluation were prompted by Christian's belief that Corcoran did not participate on enough hospital committees and Corcoran agreed she did not participate on committees because she was going to college. There was also an incident after Corcoran's encounter with McArthur in the hospital vestibule when Corcoran said, "here comes the Gespato" referring to Nurse Supervisors Kim Walsh and Michelle McArthur. Corcoran didn't even remember saying the words but Walsh and McArthur testified she said it and active union member Barbara Cooke confirmed that Corcoran said it. Even Corcoran believes she said it after Cooke corroborated it for her sometime before the trial in this case.

Based on the testimony of Cooke I believe that Corcoran said, "here comes the Gestapo" but didn't intend for Walsh and McArthur to hear it. However, I credit Walsh and McArthur when they testified that they heard it and thought it was intended for them to hear it. Suffice it to say Walsh told Christian about the incident prompting Christian to consider it in her comments on the evaluation.

Christian also credibly testified that Corcoran complained about the merger of two units at the hospital (B3 and A4) without, in Christian's opinion, offering any concrete proposals. This was also taken into account when Christian prepared the evaluation. Suffice it to say I credit Christian's testimony that Corcoran's union activity was *not* a factor in the evaluation she gave Corcoran.

In 1998 Corcoran received all "2s" (meets expectations). In addition, this lower evaluation in 1997 did not result in Corcoran losing any money or hours and in any way jeopardized her job security or nursing career with Brockton Hospital.

I find that the Act was not violated when Corcoran received the evaluation she received.

## REMEDY

The remedy in this case should include a cease-and-desist order, the posting of an appropriate notice, and the revocation of certain overly broad written policies of Respondent.

## CONCLUSIONS OF LAW

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

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

3. Respondent violated Section 8(a)(1) of the Act:

(a) When it promulgated and maintained overly broad no-solicitation/no-distribution rules in its "Administrative Policy Manual" and "Associate Handbook."

(b) When it promulgated and maintained an overly broad confidentiality rule in its "Associate Handbook."

(c) When it refused to permit employees to distribute literature concerning terms and conditions of employment to other employees in nonworking, nonpatient care areas of the hospital during the nonworking time of the employees involved.

(d) When it discriminatorily enforced a policy of removing union notices from a nurse's locker while permitting other material to be posted on nurses' lockers and when it told an employee that a union meeting notice was "unprofessional."

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

## ORDER

The Respondent, Brockton Hospital, Brockton, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining overly broad no-solicitation/no-distribution rules in its "Administrative Policy Manual" and "Associate Handbook."

(b) Promulgating and maintaining an overly broad confidentiality rule in its "Associate Handbook."

(c) Refusing to permit employees to distribute literature concerning terms and conditions of employment to other employees in nonworking, nonpatient care areas of the hospital during the nonworking time of the employees involved.

(d) Discriminatorily enforcing a policy of removing union meeting notices from nurses' lockers while permitting other

[2] 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.

material to be posted on nurses' lockers and telling employees that a union meeting notice was unprofessional.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

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

(a) Rescind the unlawful portions of the "Administrative Policy Manual," "Associate Handbook," May 7, 1997 memorandum of Cheryl Barrows and any other written directives which prohibit solicitation or distribution during nonworking time in nonworking, nonpatient care areas of the hospital.

(b) Modify the confidentiality clause in the "Associate Handbook" to make it clear that unit employees may discuss hours, wages, and other terms and conditions of employment with their fellow employees and representatives of their union.

(c) Within 14 days after service by the Region, post at its Brockton Hospital facility in Brockton, Massachusetts, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 1, 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 March 20, 1997.

(d) 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.

[3] 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."