Community Action Commission of Fayette County, Inc. *and* Ohio Association of Public School Employees (OAPSE)/AFSCME, Local 4, AFL–CIO, Petitioner. Case 9–RC–17367

November 22, 2002

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The National Labor Relations Board has considered objections to and determinative challenges in an election held May 2, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 20 for and 20 against the Petitioner with 2 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and adopts the hearing officer's findings[1] and recommendations[2] only to the extent consistent with this Decision and Direction of Second Election.

Overview

The Employer is a private nonprofit corporation whose purpose is to aid economically disadvantaged residents of Fayette County, Ohio, to become self-sufficient through various programs, including a Head Start Program. These programs are operated by the Employer and are funded by Federal, State, and local funds. The Union is seeking to represent the Employer's Head Start Program employees.

The hearing officer recommended, inter alia, that the Employer's challenge to the ballot of Head Start Program employee Debra Tyree be overruled, and that her ballot be opened and counted. The hearing officer also recommended sustaining the Union's objections alleging that the Employer (1) threatened employees that they would lose their jobs if the Union won the election and (2) selectively videotaped employees on days that they were wearing Union tee shirts at work. The hearing officer recommended setting aside the election if the revised tally of ballots showed that the Union had lost.

Members Cowen and Bartlett do not adopt the hearing officer's recommendation to overrule the challenge to Tyree's ballot. They sustain the challenge and find that Tyree's ballot should not be opened. Consequently, the Petitioner has not received a majority of the valid ballots cast.

Members Liebman and Cowen sustain the objection based on the Employer's threat of job loss. Consequently, they find it unnecessary to pass on the hearing officer's recommendation to sustain the objection based on videotaping. The election is set aside and a second election is directed.

1. Debra Tyree

The Employer challenged Tyree's ballot on the grounds that she had been discharged effective March 31, 2000,[3] and was therefore not eligible to vote in the May 2 election. The hearing officer recommended that the Employer's challenge to Tyree's ballot be overruled, on the grounds that Tyree's termination was not effective until May 11, and that she was therefore eligible to vote in the May 2 election. We disagree. We find that Tyree was discharged on March 31 and that she was therefore ineligible to vote in the May 2 election.

a. Facts

Tyree was a teacher in the Employer's Head Start Program. She suffered a stroke on December 5, 1999, and was on leave pursuant to the Family Medical Leave Act (FMLA) when the Union filed the instant representation petition on March 17. The Employer's personnel policies provide, inter alia, for termination of employment in the event of a resignation or a discharge due to incompetence and misconduct. There is no express provision for termination because of inability to return to work upon expiration of FMLA leave.[4]

The Employer's fiscal officer, Jennifer Hollar Young, notified Tyree by letter on March 15, 2 days before the representation petition was filed, that her health insurance and life/disability insurance benefits would terminate on March 31, because she had exhausted her 12 weeks of eligibility for receipt of benefits under the FMLA. The letter also asked Tyree to inform the Employer if she found out from her physician by March 24 that she would be able to return to work before April 1.

The Employer's Head Start director, Cathy Jo Eggleton, wrote to Tyree on April 3, advising her that it had delayed her "release of employment" until March 31, in

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation that the challenged ballot of Heather Michael be neither opened nor counted because, at the hearing, the parties stipulated that Michael was not eligible to vote in the election.

[3] All dates are 2000 unless otherwise stated.

[4] We do not pass on the validity of Tyree's discharge under these policies. We say only that there was a discharge on March 31. We note that we would reach the same result here if we used the April 3 date of the Employer's termination letter to Tyree as the effective date of the discharge.

the hope that she would have returned to work by then. The letter went on to say:

> Because we have no definite date for your return and because the role of teacher is critical, we can no longer hold this position open. Your release from employment with Head Start is effective March 31, 2000, pending Policy Council approval. You are encouraged to reapply as your health improves and vacancies at Head Start become available.

Eggleton testified that Head Start employees are normally discharged after engaging in some type of prohibited conduct, and that if she determines that an employee "needs to be terminated," then "that's what I do." She also testified that she makes recommendations for termination to her superior, the Employer's executive director.[5] She further testified that the Employer's Head Start Program Policy Council "has the opportunity to concur or to not concur" with a termination, and that it has never failed to concur with a decision that she has made to terminate an employee. As to Tyree, Eggleton testified that the medical statement from Tyree's doctor was inconclusive as to when, if ever, Tyree could return to work. Thus, according to Eggleton, "her [12 weeks FMLA leave] time was up and so she was released." Eggleton testified that "when her time was up, when the 12 weeks was over, she was no longer employed" by the Employer.

The Policy Council referred to above is a formal Head Start Program governing body. More specifically, the Employer's Head Start Program operates under regulations set forth in Title 45, Code of Federal Regulations, Chapter XIII, Subchapter B, Parts 1301–1311. Section 1304.50, Program Governance, its subsections, and appendix A thereto provide, in pertinent part, essentially that the Employer must establish and maintain a formal structure of shared governance of the Head Start Program, through which parents can participate in policymaking or in other decisions about the program. This governance structure must consist of, inter alia, a Policy Council, comprised of parents of children currently enrolled in the Head Start Program, and local community representatives (as further defined in the CFR). At least 51 percent of the Policy Council members must be parents of children currently enrolled in the Head Start Program.[6] Members of the Employer's staff are not permitted to serve on the Policy Council.

Title 45 CFR § 1304.50(d)(1)(xi) states in pertinent part:

> Policy Councils . . . must work in partnership with key management staff . . . to develop, review, and approve or disapprove . . . [d]ecisions to hire or terminate any person who works primarily for the . . . [Employer's] Head Start program.

Appendix A to 45 CFR § 1304.50 specifies and delineates governance and management responsibilities in the operation of Head Start programs. In regard to § 1304.50(d)(1)(xi), supra, appendix A expressly provides that the Policy Council "[m]ust approve or disapprove decisions to hire or terminate any person who works primarily for [the Employer's] Head Start program," and elaborates that:

> [The Policy Council] must be involved in the decision-making process prior to the point of seeking approval. If [the Policy Council] does not approve, a proposal cannot be adopted, or the proposed action taken, until agreement is reached between the disagreeing groups.[7]

The representation election was held on May 2. Tyree voted, and the Employer challenged her ballot. Tyree did not seek to have the Policy Council review her termination. On May 11, Tyree's termination was presented to and approved by the Policy Council. Eggleton testified that no correspondence was ever sent to Tyree notifying her that the Policy Council had approved her termination.

b. Analysis and conclusion

The hearing officer cited the rule that the Board has applied to medical leave issues: a unit employee who is on medical leave of absence on either the voting eligibility date or the date of the election, or on both dates, is presumed to continue in an employed status unless and until this presumption of continued employment is rebutted by an affirmative showing that the employee has re-

[5] The executive director apparently approved the recommendation to discharge Tyree. See Eggleton's letter of April 3, supra.

[6] Eggleton testified that the Policy Council here has four parent members and three community representatives.

[7] The Employer introduced into evidence, without objection, a two-page document (E. Exh. 2) described by the Employer's counsel as a "Performance Standard," published by the U.S. Department of Health and Human Services. The document is not further identified, and its source is not revealed. The document makes express reference to appendix A to § 1304.50, supra, and it provides as follows in regard to § 1304.50(d)(1)(xi):

> A method for including the Policy Council . . . in the approval of decisions to hire or terminate individuals working for the [Head Start] program is essential. Some roles of the Policy Council . . . are to: . . . . Participate in the approval process, without taking responsibility for directly hiring or terminating individuals, because this is a management function.

This "Performance Standard" is not, in any event, part of the Code of Federal Regulations.

signed or been terminated. *Red Arrow Freight Lines*, 278 NLRB 965 (1986). See also, e.g., *Supervalu, Inc*., 328 NLRB 52 (1999) (then-Member Hurtgen dissenting in pertinent part).

The hearing officer then essentially found the following: termination of Head Start teachers requires approval of the Policy Council; Tyree, a Head Start teacher, was still employed on medical leave of absence on the March 29 voting eligibility date; notwithstanding that Tyree's 12-week entitlement to leave and benefits under the FMLA expired on March 31, the Policy Council did not give its required approval for her termination until May 11; Tyree was therefore still employed on medical leave of absence on the May 2 election date and was therefore eligible to vote under *Red Arrow*. Accordingly, the hearing officer overruled the Employer's challenge to Tyree's ballot. We disagree.

We agree with the Employer that Tyree was discharged effective March 31 and was therefore not eligible to vote in the May 2 election. We are mindful that, under the Employer's administrative apparatus, the Policy Council was required to review the March 31 discharge and did not do so until May 11, after the election. However, there are significant factors showing the primacy of the March 31 date. The Policy Council acted retroactively. It approved Tyree's March 31 discharge. The Employer's administrative regulations do not preclude a finding that Tyree's discharge was therefore effective on March 31. Tyree did not challenge her March 31 discharge. Indeed, when asked at the hearing when she was terminated, Tyree replied, "March 31st." Tyree received written notification from the Employer of her March 31 discharge. In sum, although there was a theoretical possibility that the Employer's action of discharging Tyree could be reversed, that possibility does not contradict the fact that the Employer had indeed discharged Tyree on March 31. Under these circumstances, we find that Tyree was discharged on March 31 and we shall overrule the challenge to her ballot and neither open it nor count it.[8]

2. Threat of job loss

a. Facts

In early April, i.e., about 3 weeks before the election, employee Susan Eckle, in the presence of employees Shelly Knisely and Davette Mead, asked Supervisor Jodie Baker about rumors that Eckle would not get her "Family Partner" job back after she returned from summer layoff.[9] Baker told her that if the Union "came in," Eckle might not have a job. In answer to a question, Baker further told Eckle that if the Union did not "come in," then Baker would "lay [her] life on it" that Eckle would keep her job. Eckle discussed this incident with Knisely that day, and with employee Lisa Massey a few days later. She also repeated Baker's remarks at a union meeting.[10]

Eckle testified that Baker subsequently made it clear to her that Eckle's support or nonsupport for the Union made no difference in whether she would be recalled to work in the fall, and that Eckle's job would not be affected by how Eckle voted in the election. Eckle testified that she and Knisely went into Baker's office and Baker assured them "it wasn't going to affect our job which way we voted."

In addition, Eggleton testified about her prepetition March 10 meeting with employees.[11] Eggleton called the meeting to address questions about whether employees would be fired if they supported the Union and the Union lost the election, or if they opposed the Union and the Union won. Eggleton assured employees that they would not lose their jobs under either circumstance, and that their job performance, not their union sympathies, would determine whether they would keep their jobs. Furthermore, Eggleton testified that she reiterated these assurances to employees "daily" from then on through the date of the May 2 election.

Finally, on April 27, 5 days before the election, Employer Deputy Director Bambi Baugh sent a letter to all unit employees, in which she stated, inter alia, that she did not believe a Union handout that accused a manager of making unlawful statements. Baugh's letter stated:

> I was with this manager during training we had dealing with this very issue. She obviously understood everything she was being taught. CJ [Eggleton] attended a workshop last January . . . where one of the presenters was from the National Labor Relations Board. She learned that during a union campaign, union representatives may promise, misrepresent and lie to get people to vote pro-union.

[8] Since Tyree was discharged on March 31, she was ineligible even under the *Red Arrow* test. It is therefore unnecessary to pass on its validity. Member Bartlett disagrees with the *Red Arrow* test. See Member Bartlett's personal footnote on this issue in *Agar Supply Company, Inc*., 337 NLRB 1267 (2002). Member Bartlett agrees that Tyree was discharged on March 31. Accordingly, even under *Red Arrow*, Tyree is ineligible to vote.

[9] Head Start teacher Tina Miller testified that the Head Start Program runs from about Labor Day through mid-May each academic year, and that the teachers usually get laid off in mid-May and recalled in late August.

[10] The record does not reveal how many employees attended this meeting.

[11] The petition was filed on March 17.

b. Analysis and conclusion

We agree with the hearing officer, for the reasons she sets forth and as further discussed below, that Baker threatened Eckle with loss of her job if the Union won the election, that this threat was immediately and subsequently disseminated to other employees, and that it interfered with this very close election. An employer's threat of job loss if a union wins an election is objectionable conduct warranting the setting aside of that election. See, e.g., *Jonbil, Inc*., 332 NLRB 652 (2000); *Audubon Regional Medical Center*, 331 NLRB 374 (2000). Accordingly, we adopt the hearing officer's recommendation to sustain this objection and to set aside the election and direct a second election.

The Employer argues that Baker's alleged threat could not have affected the outcome of the election, pointing to "subsequent statements or denials by management to employees" to the effect that their support or nonsupport of the Union made no difference in whether they would keep their jobs. We disagree. Although parties to an election should be encouraged promptly to repudiate potentially objectionable statements or conduct, we find that the Employer did not effectively do so here.[12] Eggleton's March 10 prepetition remarks to employees were made about a month before Baker's threat to Eckle, and thus, obviously, cannot be said to have repudiated it. Further, none of the alleged repudiations focused on the threat uttered to Eckle. The threat to Eckle pertained to the consequences of a *union victory or loss.* The alleged repudiation focused on the consequences of individual employees' support or nonsupport of the Union.[13]

Thus, the Employer's post-threat assurances did not specifically and unambiguously repudiate Baker's threat. Nor did they disavow future interference by the Employer in the employees' exercise of their Section 7 rights. As the hearing officer said:

> [N]one of these subsequent statements or denials to employees as to the effects of their individual positions concerning the union on their individual job situations reached the heart of Baker's threat to Eckle and the two other family partners [i.e., Knisely and Mead]: if the Union was selected as the employees' collective-bargaining representative their jobs were in jeopardy.

Contrary to Member Bartlett, the difference between the Employer's threat and the Employer's assurances did not involve a mere "distinction without a difference." As emphasized, the Employer's threat was that a *union victory* would have a detrimental effect on employees. By contrast, the assurance was that an *individual's* stance on unionization would not bring retaliation to him/her. Thus, an employee could support the Union and not fear consequences. However, based on the Baker threat, the employee would fear consequences if the Union won the election. The latter fear was not eliminated by the Employer's assurances.

Furthermore, Baker's threat was not repudiated by Bambi Baugh's letter to employees sent April 27, 5 days before the election. In that letter, Baugh expressed her personal disbelief that a manager (apparently *Eggleton*, not Baker, from the context of this letter) had made unlawful statements. She also assured the employees that Eggleton had attended a workshop where one of the presenters was from the National Labor Relations Board and Eggleton had "obviously understood everything she was being taught"—including, according to the letter, "that during a union campaign, union representatives may promise, misrepresent, and lie to get people to vote prounion."

Baugh's letter fails as an effective repudiation of Baker's threat, even assuming that the letter was timely—coming about 3 weeks after the threat and only 5 days before the election. The letter did not unambiguously and specifically repudiate that threat, and it contained no assurances against future interference by the Employer in the employees' exercise of their Section 7 rights.

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[12] In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board articulated the standard for how an employer can avoid liability for unlawful statements or conduct by effectively repudiating it. Although the *Passavant* standards were developed to address the repudiation of unfair labor practice conduct, the Board has also applied these standards, by analogy, to assess whether otherwise objectionable conduct has been effectively neutralized by other employer statements. *Warren Manor Nursing Home*, 329 NLRB 3, 4 (1999); *Columbia Alaska Regional Hospital*, 327 NLRB 876, 877 (1999); see also *Gaines Electric Co*., 309 NLRB 1077, 1081 (1992). To be effective under Passavant, the repudiation must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct, adequately publicized to the employees involved, not followed by other proscribed conduct, and accompanied by assurances to employees that the employer will not interfere with the exercise of their rights under Sec. 7 of the Act. 237 NLRB at 138–139.

Although Member Cowen does not agree with all of the *Passavant* requirements for effective repudiation, he agrees that, in the instant case, for the reasons set out below the purported repudiation did not address the substance of the threat, and that given the absence of even a general repudiation and the closeness of the election, the unrepudiated threat constitutes objectionable conduct.

[13] Member Cowen considers Baker's statement to Eckle to be a "threat" only to the extent that it is a prediction of adverse consequences of unionization that was not accompanied by objective considerations supporting the prediction. See *NLRB v. Gissel Packing*, 395 U.S. 575, 618 (1969). Member Cowen does not consider this to be a threat of retaliation for union activity, and therefore the Employer's subsequent assurances concerning non-retaliation were not responsive to this "threat."

Accordingly, we adopt the hearing officer's recommendation to sustain Objection 1.

[Direction of Second Election omitted from publication.]

MEMBER LIEBMAN, concurring in part and dissenting in part.

For the reasons set forth in the majority opinion, I join Member Cowen in adopting the hearing officer's finding that the Employer engaged in objectionable conduct, warranting the setting aside of the election, when Supervisor Jodie Baker threatened employees that if the Union won the election, employee Susan Eckle might not keep her job. I also agree that the Employer did not effectively repudiate this threat.[1]

Contrary to my colleagues, however, I would adopt the hearing officer's findings that employee Debra Tyree was employed on both the voting eligibility cutoff date and the date of the election. My colleagues find that Tyree was discharged effective March 31, 2000,[2] and that she was therefore ineligible to vote in the May 2 election. I disagree. Tyree was not discharged until May 11, when the Employer's Head Start Policy Council gave its statutorily-required approval for Tyree's discharge. Tyree was therefore eligible to vote in the May 2 election, and her ballot should be opened and counted.

The majority opinion sets forth most of the relevant facts. I add, however, that while the Employer's formal Personnel Policies provide that medically eligible employees—like Tyree—are entitled to 12 workweeks of leave under the Family Medical Leave Act (FMLA), nowhere do these policies state or even imply that an employee's employment terminates when, and simply because, her 12 weeks of FMLA leave expires. Indeed, the Employer's formal Personnel Policies imply the opposite, as follows:

> SECTION V—LEAVE OF ABSENCE
>
> 1.9 An employee who has been approved for FMLA leave is entitled to be reinstated to the same job or equivalent position with equivalent pay, benefits, and terms and conditions of employment as before taking leave.

This entitlement to reinstatement is neither conditioned on the continuation of the FMLA leave nor extinguished by its expiration. The Employer's formal Personnel Policies contain no provision permitting, much less requiring, termination of an employee simply because she is unable to resume her work upon expiration of her FMLA leave. Indeed, the Personnel Policies expressly provide for termination for only three reasons: resignation, incompetence, or misconduct. Further, while the Employer informed Tyree on March 15 that her health, life, and disability insurance coverage was being terminated, coincident to expiration of her FMLA leave, the Employer did not tell her that her employment itself would also be terminated. This was its last correspondence to her prior to her purported discharge on March 31. In fact, when the Employer actually notified Tyree by letter on April 3 that she was being "release[d] from employment," it stated that her FMLA leave had expired on *March 10*, but that the Employer had delayed her "release of employment" until March 31, in the hope that she would have returned to work by then. The letter went on to say:

> *Because we have no definite date for your return and because the role of teacher is critical*, we can no longer hold this position open. Your release from employment with Head Start is effective March 31, 2000, *pending Policy Council approval*. You are encouraged to reapply as your health improves and vacancies at Head Start become available. [Emphasis added.]

Thus, the Employer, by the express terms of its own letter to Tyree, did not terminate her because her FMLA leave had expired, but rather because it had no definite date for when Tyree would return to work, and because it could no longer leave Tyree's teaching position unfilled. Therefore, Head Start Director Eggleton's claims at the hearing, that Tyree was terminated on March 31 *because* her FMLA leave had expired and the Employer's Personnel Policies *required* that she therefore be terminated at that time, are neither factually supported nor procedurally justified under those Policies.

To the contrary, as the record clearly establishes, Tyree's employment as a Head Start teacher was not terminated until the Head Start Policy Council officially acted on her case on May 11, more than a week after the May 2 election. The Policy Council is a formal Head Start Program governing body. The Code of Federal Regulations expressly requires that the termination of Head Start teachers must be approved or disapproved by the Head Start Policy Council. 45 CFR § 1304.50(d)(1)(xi) and appendix A (i.e., the Policy Council "[m]ust approve or disapprove decisions to hire or terminate any person who works primarily for [the Employer's] Head Start program"). Under that provision, Tyree's termination was not finally effective until the

[1] See, e.g., *Warren Manor Nursing Home*, 329 NLRB 3, 4 (1999), applying, by analogy, standards of repudiation of unfair labor practice conduct articulated in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). I note that, regardless of his disagreement with some of the *Passavant* requirements, Member Cowen agrees that the Employer did not effectively repudiate Baker's objectionable threat.

[2] All dates are 2000 unless stated otherwise.

Policy Council approved her discharge. The Policy Council did not grant its statutorily required formal approval of Tyree's discharge until May 11, prior to which Tyree remained an (as-yet undischarged) employee of the Employer on medical leave of absence.

Accordingly, Tyree remained eligible to vote in the May 2 election under the well-established rule of *Red Arrow Freight Lines*, 278 NLRB 965 (1986): a unit employee who is on medical leave of absence on either the voting eligibility date or the date of the election, or on both dates, is presumed to continue in an employed status unless and until this presumption of continued employment is rebutted by an affirmative showing that the employee has resigned or been terminated. In my view, no such affirmative showing has been made here.

I would therefore overrule the challenge to Tyree's ballot, open and count it, and certify the Union if it turns out that it won the election. If the Union lost the election, I would (as Member Cowen and I in fact join in doing here, given the majority's sustaining the challenge to Tyree's ballot) set aside the election on the basis of the Employer's objectionable threat of job loss if the Union won.

MEMBER BARTLETT, dissenting in part.

Contrary to my colleagues, I would overrule the Petitioner's objection based on Supervisor Jodie Baker's threat of job loss. I therefore find it necessary to reach the Petitioner's remaining objection based on the Employer's alleged videotaping of protected activity, and, contrary to the hearing officer, would overrule that objection as well.

1. Threat of job loss

With regard to Supervisor Baker's threat of job loss, the totality of the circumstances demonstrates that the threat would not have interfered with the election. The employees received numerous assurances, both before and after Baker's comment, by the top manager and Baker herself, that the Employer would not discharge employees because of their union activities or because of the outcome of the election. Thus, at a March 10 staff meeting attended by most of the employees, Employer Director Cathy Jo Eggleton specifically addressed rumors that employees' postsummer recall would be adversely affected by the union campaign. Eggleton told the assembled employees that whether an employee supported the Union or opposed the Union would have nothing to do with whether the employee kept her job. Furthermore, Eggleton reiterated this message—that the union campaign would have no impact on the employees' jobs—to employees on a daily basis throughout the union campaign. The Union also reiterated Eggleton's message in a March 22 employee mailing, quoting Eggleton as saying, "If you vote for the union, you won't lose your job." Moreover, when an employee raised Baker's threat at a union meeting, union officials reassured the employees at the meeting (including the three employees who had heard Baker's threat), that the Employer could not consider the union campaign in making employment decisions regarding the employees. Finally, at some point after that union meeting but before the election, employees Susan Eckle and Shelly Knisely (two of the three employees who heard Baker's original threat) discussed Baker's threat with Baker herself. Baker assured Eckle and Knisely that whether an employee supported the Union would have no effect on the employee's job.

As the majority notes, the Board's standard for curing unlawful statements is set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).[1] Applying this standard, the Board inquires whether an employer's curative assurances are timely, unambiguous, specific in nature to the unlawful statement, free from other proscribed conduct, adequately publicized to the employees involved, and accompanied by assurances that the employer will not interfere with the employees' statutory rights. This standard, however, should not be applied in "a highly technical or mechanical manner." *Broyhill Co.*, 260 NLRB 1366, 1366 (1982). The Employer here substantially satisfied the *Passavant* requirements by Director Eggleston's assurances to the assembled employees at the March 10 staff meeting, by Director Eggleston's assurances to individual employees throughout the campaign, and by Supervisor Baker's post-threat assurances to two of the three directly-involved employees. Furthermore, the Board has found no other unlawful or objectionable conduct by the Employer during the campaign.

In finding that the Employer's assurances did not cure the threat, my colleagues emphasize that Supervisor Baker's threat was a threat of retaliation *triggered by a union election victory* and that the Employer's assurances principally addressed retaliation *triggered by an individual employee's support for the Union*. However, this is a distinction without a difference. Accordingly, it provides no support for my colleagues' finding.

2. Videotaping

With regard to the Employer's videotaping of protected activity, the evidence shows that the Employer had a legitimate purpose for the videotaping and that the Em-

[1] I express no opinion regarding whether the Board should continue to adhere to the *Passavant* standard for effective repudiation of misconduct.

ployer communicated this legitimate purpose to the affected employees.

The credited testimony shows that Supervisor Baker videotaped teacher Tina Miller and assistant teacher, Suzette Adams, with Miller's class on Thursday, March 23, that Baker videotaped them again on Thursday, March 30, and that on both days Miller and Adams were wearing union T-shirts pursuant to a union campaign strategy of wearing the union T-shirts to work on Thursdays.[2]

Employer actions that create the impression of surveillance of employees' protected activities coerce employees in the exercise of their statutory rights. *Standard Sheet Metal, Inc.*, 326 NLRB 411, 423 (1998); *Sonoma Mission Inn & Spa*, 322 NLRB 898, 902 (1997). However, where employer actions are undertaken for a legitimate purpose, the actions are lawful notwithstanding that the actions may incidentally create the impression of surveillance. *Saia Motor Freight Lines, Inc.*, 333 NLRB 784 (2001).

Here, the Employer wanted to make a videotape of school activities to show to prospective customer parents during the summer months when the school would be shut down. The Employer asked Supervisor Baker to make a videotape for this purpose and Baker made the videotape. The Employer did, in fact, use the videotape for the announced purpose—that is, the Employer showed the videotape to prospective customer parents. Furthermore, Supervisor Baker told employee Adams, in response to Adams' question while Baker was videotaping the class, that she (Baker) was making the videotape to show parents who visited the school during the summer what the school rooms looked like during the school year. Similarly, when an employee at a staff meeting asked about the videotaping, the Employer repeated this explanation to the assembled employees—that is, that the Employer was making a video to show to prospective customer parents during the summer.

In these circumstances, the Employer has demonstrated its legitimate purpose for the videotaping and that the employees were aware of that legitimate purpose. Accordingly, I would overrule the objection alleging election interference resulting from the videotaping.

In recommending that the Board sustain the objection, the hearing officer relied, in part, on evidence showing that the employees discussed the videotaping at a March 30 union meeting and that the employees there decided to discontinue the practice of wearing the union T-shirts to work every Thursday. However, assuming arguendo that the employees' action—in discontinuing the Thursday union T-shirt practice—showed that the employees felt coerced by the videotaping, this fact would not render the videotaping objectionable. As noted above, where an employer has a legitimate purpose for surveillance, the surveillance is lawful notwithstanding possible incidental impact on employees' concerted activities; this is particularly true where, as here, the employer explicitly communicates that legitimate purpose to the employees.

Furthermore, in evaluating the coercive tendency of an employer's action, the Board relies upon objective rather than subjective evidence of employee coercion. *C.P. Associates, Inc.*, 336 NLRB 167 (2001); *East Side Shopper, Inc.*, 204 NLRB 841, 845 (1973) (alleged impression of surveillance). The fact noted by the hearing officer—that the employees decided to discontinue the every-Thursday tee shirt practice—is, at most, subjective evidence of employee coercion.

Finally, although the videotaping may have caused the employees to discontinue the practice of wearing the union T-shirt to work every Thursday, the videotaping did not cause the employees to discontinue wearing the union T-shirt to work. To the contrary, the employees continued wearing the union T-shirt to work, albeit on a random basis.

Accordingly, for all the foregoing reasons, I would overrule the Petitioner's objections and certify the results of the election.

[2] Baker testified that she videotaped activities throughout the school on March 28 and 30, but denied doing any videotaping on March 23.