Southern Monterey County Hospital d/b/a George L. Mee Memorial Hospital *and* Health Care Workers Union, Local 250, Service Employees International Union.[1] Cases 32–CA–17687–1 and 32–RC–4664

September 29, 2006

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On January 11, 2001, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, and the Respondent filed a reply brief.

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 as modified below and to adopt the recommended Order as modified and set out in full below.[3]

The Respondent operates an acute care hospital in King City, California. On August 13, 1999,[4] the Union filed a petition to represent certain of the Respondent's employees. Pursuant to a stipulated election agreement, the Board held a secret ballot election on October 6 and 7. Subsequent to the election, the Union filed timely election objections, many of which mirror its unfair labor practice charges alleging violations of Section 8(a)(1) and (3) of the Act.

A. Unfair Labor Practices

We adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act by: Supervisor Virginia Rojas' coercively interrogating employees, creating the impression of surveillance, and threatening job loss in mid to late August; Supervisor Eleazar Barroso's threatening employee Ramirez with unspecified reprisals in August; supervisor Margaret Johnson's coercively interrogating employees Mullanix-Ackerman and Williams and threatening them with job loss in August; Supervisor Denise Miller's coercively interrogating Mullanix-Ackerman about other employees' union sentiments in September;[5] Rojas' threatening employees with job loss in September;[6] Rojas' offering employee Garcia financial aid on September 30; Rojas' statements at an October 1 employee meeting banning the wearing of union insignia;[7] Rojas' threatening job loss on October 6;[8] Rojas' ban on talking about the Union during "work hours" made on numerous occasions; Rojas telling employees that they stabbed her in the back; and Rojas telling employees that they were liars and backstabbers after the ballot count on October 7.[9] We also adopt the judge's finding that the Respondent violated Section 8(a)(1) by maintaining and enforcing overbroad no-solicitation/no-distribution and no-access rules for employees.[10]

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

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

[3] We have modified the judge's recommended Order in accordance with our decision in *Ishikawa Gasket,* 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[4] Unless stated otherwise, all dates occurred in 1999.

[5] Because we agree that Respondent violated Sec. 8(a)(1) by Rojas' and Johnson's separate coercive interrogations of employees and by Miller's questioning Mullanix-Ackerman about other employees' union sentiments, we find it unnecessary to pass on whether Rojas's questioning of employees in September and Miller's questioning of Mullanix-Ackerman about *her own* union sentiments was unlawful. The finding of additional violations would be cumulative and would not affect the remedy.

[6] In adopting the judge's finding, we rely upon the credited testimony of employee Garcia that Rojas threatened that "there's other people who would take [their] jobs," if they went on strike.

[7] The judge also found that other Rojas statements at the meeting coercively implied that employees were disloyal and contained a thinly veiled threat of reprisal should the employees fail to inform her of future union activity. We find it unnecessary to pass on these findings of violations, which were not alleged in the complaint, because they are cumulative of other violations found herein and would not materially affect the remedy. Other aspects of the judge's decision suggest that she also found these statements to be unlawful solicitations of grievances. However, the analysis, conclusions of law, and recommended Order make clear that no such violation was found.

[8] Specifically, we agree with the judge that Rojas threatened job loss by telling Perez that she had been told to get rid of Perez but would not do so because Perez was a hard worker.

[9] Member Schaumber does not reach the question of whether Rojas violated Sec. 8(a)(1) by calling the employees "liars."

[10] Chairman Battista and Member Schaumber acknowledge *Tri-County Medical Center*, 222 NLRB 1089 (1976), as controlling precedent in adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) by maintaining this no-access rule. The Chairman notes that, under *Tri-County*, supra, a no-access rule can be valid if it is justified by business reasons. In the instant case, the Respondent has not given a justification for its rule.

Member Schaumber finds it unnecessary to pass on the following unfair labor practices found above: Johnson's alleged coercive interrogation and threat of job loss of Mullanix-Ackerman and Williams; Miller's alleged coercive interrogation of Mullanix-Ackerman; and Barroso's threatening employees with unspecified reprisals. A finding that these statements were unlawful would be cumulative of other violations found herein and would not materially affect the remedy.

For the reasons stated below, however, we reverse the judge's findings that the Respondent violated Section 8(a)(1) by the statements about striker replacement made by Supervisor Johnson on August 5; by Rojas' October 1 statement that all unions do is take employees' money; by Respondent's CEO Walter Beck's alleged solicitation of grievances at an October 1 employee meeting; by Rojas' October 1 alleged threats of job loss, reduction of wages and loss of benefits; by Rojas' October 6 statements about striker replacement and questioning employees Natividad Felix and Henrietta Perez about a union flier; by Rojas' stating that employees do not need a union; and by maintaining a no-solicitation/no-distribution rule applicable to nonemployees. We also reverse the judge's finding that the Respondent violated Section 8(a)(3) by refusing to allow Mullanix-Ackerman to rescind her resignation or to rehire her.

1. The judge found that Supervisor Margaret Johnson violated Section 8(a)(1) by telling employees Carla Mullanix-Ackerman and Laura Williams, in a conversation on August 5 at the central sterile desk, that if employees went on strike, they would be permanently replaced. We reverse the judge's finding of an unfair labor practice.

In *Eagle Comtronics*, 263 NLRB 515 (1983), the Board considered the extent of an employer's obligation, on informing employees that they may be permanently replaced in an economic strike, to provide an accurate picture of employee rights under *Laidlaw*.[11] The Board stated that:

> [A]n employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike. . . . Unless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats, it is protected by Section 8(c) of the Act. . . . [A]n employer may address the subject of striker replacement without fully detailing the protections enumerated in Laidlaw, so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in Laidlaw.

Thus, an employer may, for example, lawfully inform employees that they would be permanently replaced if they went on strike. See, e.g., C*hromalloy American Corp*., 286 NLRB 868, 871–872 (1987), enf. denied on other grounds 873 F.2d 1150 (8th Cir. 1989). That is all that Johnson told the employees on this subject. Accordingly, we find no violation.

2. We agree with the judge that Rojas violated the Act at an October 1 employee meeting by instructing employees to remove union buttons. The judge further found that at the same meeting Rojas coercively informed employees that unionization would be futile, and that the Respondent's Chief Executive Officer Walter Beck unlawfully solicited employee grievances.

We disagree with the judge's finding that Rojas coercively informed employees at the October 1 meeting that unionization would be futile. At the October 1 meeting, Rojas told employees that unions just want employees' money and that employees would have to pay union dues without a guarantee of receiving benefits in return. While the statement suggests that unionization will not benefit employees, such statements of opinion do not violate Section 8(a)(1) but are instead protected by the free speech provisions of Section 8(c) of the Act. *Trailmobile Trailer, LLC.*, 343 NLRB No. 17, slip op. at 1 (2004) ("[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).").[12] Accordingly, the statement did not violate Section 8(a)(1).[13]

We also disagree with the judge's finding that CEO Beck unlawfully solicited grievances.[14] Beck and Director of Nursing Raye Burkhardt did not enter the October 1 meeting until after Rojas had addressed the employees. According to staff nurse Eva Reyes, Beck told the employees that Burkhart and he were there to answer questions or concerns and told them that if there were problems they could solve, the employees should speak to him. Reyes told Beck it was difficult for employees to speak to him because he was intimidating. Beck responded that it was probably because he was so tall, that he tried to be there for the staff but unfortunately did not have the time. Reyes stated it was her perception that Beck walked around the hospital finding fault and never complimented employees on things they did correctly. Beck asked Reyes where her anger was coming from and, when she replied that she was frustrated, asked her if it was due to the

[11] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969).

[12] Sec. 8(c) provides that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

[13] We find, for the same reasons, that Rojas' statement that employees did not need a union, discussed at sec. III.K of the judge's decision, also did not violate Sec. 8(a)(1).

[14] Member Walsh does not join in this part of the decision, for the reasons set forth in his partial dissent.

Respondent's negotiations with the California Nurses' Association (CNA).[15]

Beck's testimony concerning this meeting differed. He recalled telling employees he was there to ensure they had the appropriate information to make the right decision but was not there to resolve any of their issues. Beck also said that he could not make any promises. He denied making any reference to the CNA negotiations. According to Burkhardt, Beck asked employees whether they had any questions and did not ask what their problems were. Rojas could not remember exactly what Beck told the employees but did recall that Beck said something about having an open door policy if there were any more questions.

The judge made no credibility resolutions. Instead, she found that Beck's presence at the meeting was in direct response to the Union's campaign and that there was no precedent for his addressing employees—whether to ask if they had any questions or to ask that they open up and talk to him about problems that might be solved. The judge concluded that, by extending an open door policy at the height of the Union's campaign, where no such policy previously existed, the Respondent solicited grievances and impliedly promised to remedy them. Again, we disagree.

We assume, arguendo, that Beck asked employees at the October 1 meeting to open up and talk to him about problems that might be solved, and that this question can be viewed as a solicitation of grievances.[16] However, a solicitation of grievances by an employer during an organizational campaign is not itself unlawful. It merely raises a rebuttable inference that the employer is promising to remedy those grievances. *Uarco,* Inc., 216 NLRB 1, 2 (1974). It is that implicit promise which, if made, violates Section 8(a)(1).

Here, we find that the Respondent successfully rebutted any inference that it was promising to remedy grievances.[17] Beck made no express promises at the meeting. To the contrary, Beck testified that he expressly told employees that he could not make any promises.[18] In these circumstances, as in *Uarco*, supra, 216 NLRB at 2, "any possible inference of a promise of benefits was specifically negated by the express 'no promise' responses to the employees' complaints." Thus, absent inconsistent conduct, that statement was sufficient to rebut any inference of a promise to remedy grievances even assuming that there was no prior instance in which Beck asked employees for their questions or problems. Id. at 2, fn. 5.[19] Furthermore, Beck proffered no solution to the only grievance raised by any employee during the meeting. According to Reyes, after she complained to Beck that he was intimidating, Beck replied only that he was probably intimidating because he was so tall. That response is inconsistent with a promise to remedy grievances. Cf., *Airport 2000 Concessions*, 346 NLRB No. 86, slip op. at 3–4 (2006) (evidence of manager's equivocal and ambiguous responses to employee complaints sufficient to rebut inference of implied promise to remedy solicited grievances). Under the circumstances, even if Beck did invite employees to speak to him about "problems they could solve," employees would not reasonably believe from the entirety of his remarks at this meeting that he was implicitly promising to remedy any grievances. We therefore reverse the judge's finding that the Respondent violated Section 8(a)(1).

3. On or about October 1, Rojas entered the office where medical/surgical unit secretary Natividad Felix and CNA Leonore Ramos were eating lunch and told them that if employees unionized and went on strike, Respondent could easily find replacements for positions such as CNAs, dietary aides, and housekeeping. Felix responded that the Union offered better wages and benefits. Rojas answered that benefits could go down. The judge found that Rojas' statements violated Section 8(a)(1). We disagree.

[15] Reyes was represented by the CNA.

[16] We question whether Reyes' testimony that Beck made this statement is a substantial basis for finding a violation. As noted above, the other witnesses did not testify to the alleged statement and the judge did not make credibility resolutions on this point.

[17] Contrary to the dissent, we find that Supervisor Rojas' statement earlier in the meeting that "we can't solve departmental problems unless we know about them" has no bearing on the legality of Beck's conduct. Rojas' statement was not alleged in the complaint as a solicitation of grievances, and the judge did not find that Rojas solicited employee grievances. In addition, her statement was made when Beck was not even present at the meeting.

[18] Beck's testimony that he told the employees he could not make any promises was uncontradicted, and the judge did not discredit it.

[19] The dissent attempts to limit the import of the express disclaimer of promises in *Uarco* by noting that they were coupled with statements that the complaints raised by employees were for the employees to resolve themselves. We disagree with the dissent that these additional statements are a meaningful basis for distinguishing *Uarco*.

The dissent also cites *Michigan Products*, 236 NLRB 1143, 1146 (1978), as support for the view that Beck's statement that he could not make any promises did not negate his "implied promise" to remedy their grievances. *Michigan Products* is clearly distinguishable. In relevant part, that case involved an alleged 8(a)(1) promise of benefits, not the solicitation of grievances and the rebuttable presumption of an implied promise. The Board found the violation because, after the employer claimed it could not make promises, it *expressly* promised a profit-sharing plan contribution and "50 cents more for driving." No contradictory express promises of this character were made by Beck in this case.

As stated above, an employer may lawfully inform employees that they are subject to permanent replacement in the event of a strike, and the statement will not be found to violate Section 8(a)(1) even if the employer does not fully describe the employees' *Laidlaw* rights. *Eagle Comtronics*, supra. Here, Rojas told employees that if employees unionized and went on strike, Respondent could easily find replacements. While Rojas' comments did not fully detail employees' *Laidlaw* rights, she did not expressly or implicitly threaten Felix and Ramos with job loss or other reprisals in the event of a strike. Under these circumstances, we find that Rojas' statement about replacements for striking employees did not violate Section 8(a)(1).

Likewise, we find that Rojas' statement that benefits could go down also did not violate Section 8(a)(1). Under well established Board law, predictions of adverse consequences from unionization that go beyond the objective facts will be interpreted as threats of reprisal. *Reeves Bros., Inc.*, 320 NLRB 1082, 1082–1083 (1996). In the instant case, Rojas did not go beyond the objective facts. She merely noted that benefits could go down, in response to an employee's statement that the Union offered better wages and benefits. She did not state that benefits and wages would go down. Therefore, we do not find her statement unlawful.

4. We also reverse the judge's finding that Rojas violated Section 8(a)(1) on October 6 when she asked open union adherents Natividad Felix and Henrietta Perez to explain statements attributed to them in a flier openly circulated by the Union among Respondent's employees.[20] The flier featured a picture of Felix and listed her as a member of the Union's organizing committee and included this statement, "I'm supporting the union for better working conditions and quality of care. With a union, we'll be able to negotiate our benefits package based on our needs." Rojas angrily asked what Felix meant by the flier and Felix responded that employees needed the Union to get good benefits and maybe good wages. The same flier also featured a similar statement by Perez. Rojas asked about Perez' statement while the two were in Rojas' office. Perez said her statement was self-explanatory and that she wanted a union for job security and to be treated with respect.

An employer's questioning of employees about their union sentiments does not necessarily violate Section 8(a)(1) of the Act. This is particularly so where the employees are open and active union supporters. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), affd. 760 F.2d 1006 (9th Cir. 1985) (questioning of open and active union supporter about prounion mailgram he sent to employer was not coercive).

In this case, we find no violation in Rojas' questioning of Felix and Perez. Both employees manifested their support of the Union in the openly circulated fliers. Their statements in the fliers referred to their belief that the Union would bring them better benefits. Rojas' questions directly related to those statements and did not contain threats or promises of benefits. The employees responded openly and honestly to Rojas' questions and reiterated that they wanted a union for better benefits. Given the nature of the questions, the fact that Rojas spoke to Felix in an angry tone of voice is insufficient to render the questioning coercive. At most, it showed that Rojas vigorously disagreed with the statements in the flier.

Contrary to our dissenting colleague's assertion, the fact that Rojas committed other violations does not establish that her questioning of Felix and Perez was unlawful. Rojas' question was a rhetorical one, designed to engender a discussion of the merits of unionization. Although Rojas' angry tone reflected where she stood on the matter, Felix responded with a statement of where she stood. These objective facts show an exchange of views, protected by Section 8(c) of the Act.

The dissent also notes that Rojas did not give assurances to Felix and Perez that they did not have to answer her questions and would not be subject to retaliation. Given the noncoercive character of the exchange, there was no need for such an assurance.

5. At all relevant times, the Respondent maintained the following policy:

> Under no circumstances will Hospital employees and non-employees be permitted to solicit or distribute written materials for any purpose on the Hospital premises.

This case does not involve an issue about whether the Respondent actually *enforced* this policy at any time material herein.[21] The judge found that the Respondent's

[20] Member Walsh does not join in this part of the decision, for the reasons set forth in his partial dissent.

[21] The judge erred in finding that the Respondent admitted in its answer to the complaint that it has enforced as well as maintained the rule in question. Paragraph 6(m) of the amended complaint alleges that the Respondent has "maintained and enforced" the rule in question at all times material herein. But in its answer to this allegation, the

maintenance of this rule violated Section 8(a)(1). We adopt the judge's finding insofar as the rule prohibits all solicitation or literature distribution by employees. However, we reverse the judge's finding that the rule is unlawful as it applies to nonemployees.

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1952), the Supreme Court held that an employer may lawfully bar nonemployee union organizers from private property unless the employees are inaccessible through usual channels. In the absence of a private property interest, however, the Court's holding in *Lechmere* is not controlling. See *Glendale Associates, Ltd.*, 335 NLRB 27, 28 (2001), enfd. 347 F.3d 1145 (9th Cir. 2003). The Board looks to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives. Id. California constitutional law limits a private property owner's right to exclude persons seeking access for purposes of exercising their free speech rights "if the property is freely and openly accessible to the public" *Golden Gateway Center v. Golden Gateway Tenants Association,* 26 Cal. 4th 1032, 1033 (2001). This constitutional provision applies to places which are the functional equivalent of a public forum, e.g., a shopping mall. The provision does not apply to properties such as the Respondent's private medical facility that are not public forums. *Planned Parenthood v. Wilson*, 234 Cal. App. 3d 1662, cited with approval in *Golden Gateway Center,* supra at 1033. Thus, the constitutional provision does not apply in the instant case.[22] Therefore, the Respondent's ban on solicitation and literature distribution by nonemployees on its premises did not violate Section 8(a)(1).

6. The Respondent employed Mullanix-Ackerman, a known union adherent, as a surgical technician and secretary in the surgery department.[23] On September 25, she was tardy in reporting to surgery and left early without completing her tasks. Although she worked less than 2 hours before leaving, she claimed 2 hours of work on her timecard. Registered Nurse Laurel Cheney reported the matter to Mullanix-Ackerman's supervisor, Johnson, who then conferred with her own superiors.

On October 4, Johnson met with Mullanix-Ackerman to discuss her behavior and work performance problems. Specifically, Johnson told Mullanix-Ackerman that four nurses did not want to work with her, that she was leading her coworker, Laura Williams, and thinking for her, that she was a know-it-all, and that she took too many breaks and had too many outside interruptions in her work—a reference to phone calls she received while at work. Johnson then informed Mullanix-Ackerman that her work was not up to par and that one half hour would be taken from her call-back time on September 25.

Mullanix-Ackerman stated that Johnson would have her resignation. RN Jill Baker, who was caring for a patient in an adjacent room, heard Mullanix-Ackerman's voice through the closed door. Mullanix-Ackerman repeated that she was resigning and she stopped working with 1 hour left on her shift. After she resigned, Johnson reported the matter to Burkhardt. Burkhardt told Johnson that she would discuss the matter with Beck and human resources and that they would "take it from there." Human resources then prepared a letter documenting Mullanix-Ackerman's resignation and Johnson signed it. Later that day, Mullanix-Ackerman tried to rescind her resignation but the Respondent refused to allow it. Cheney was required to cover the remaining time on Mullanix-Ackerman's shift on October 4.

The following day, Mullanix-Ackerman met with Burkhardt, who told her that she had abandoned her post, that her action was totally unacceptable, and that the Respondent had accepted her resignation. Mullanix-Ackerman repeated her wish to rescind her resignation in an October 5 letter to Beck, but was not allowed to do so.

The judge found that Mullanix-Ackerman abandoned her job and dismissed the complaint allegation that the Respondent constructively discharged her because of her union activities by verbally counseling her and announcing the half-hour pay cut during her October 4 meeting with Johnson.[24] There were no exceptions to this dismissal. Consequently, it is now undisputed that Mullanix-Ackerman abandoned her position for reasons unrelated to her protected activities. However, the judge also found that the Respondent violated Section 8(a)(3) of the Act by refusing to permit her to rescind her

Respondent admitted only that it "maintains the polic[y] specified, and except as so admitted, denies the allegations."

[22] We recognize that a California *statutory* provision (the Moscone Act) arguably does apply to private properties even if they are not public forums. *Sears v. San Diego District Council of Carpenters*, 25 Cal. 3d 317 (1979). However, the D.C. Circuit has held that *Sears* does not represent California law, *NLRB v. Waremart Foods*, 354 F. 3d 870 (D.C. Cir. 2004), and the Board has agreed that *Sears* "cannot be relied on as controlling California precedent." *Macerich Management Co.,* 345 NLRB 514, 517 (2005).

Relying on the holding in *Sears*, our dissenting colleague argues that the ban on solicitation and literature distribution by nonemployees was unlawful. The position of the dissent is at odds with the precedent cited above, and we therefore do not agree with it.

[23] Member Walsh does not join in this part of the decision, for the reasons set forth in his partial dissent.

[24] The alleged constructive discharge was based on her resignation after these disciplinary measures.

resignation. We find merit in the Respondent's exceptions to this finding.

We assume arguendo that, as the judge found, Mullanix-Ackerman's protected activity was a motivating factor in Respondent's decision not to rehire her.[25] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). However, we find, contrary to the judge, that the Respondent established that it would have refused to rehire Mullanix-Ackerman even in the absence of her protected activity.

Mullanix-Ackerman resigned her employment without notice.[26] Indeed, she walked off the job with 1 hour remaining on her shift. The Respondent's established policy prohibits rehire of employees who quit without 2 weeks' notice. There is no evidence that the Respondent has ever deviated from that policy. To the contrary, Human Resources Director Joyce Martinez testified that there were no examples of any employee who had quit without notice and was rehired. Moreover, the Respondent showed that 10 former employees quit their jobs without giving 2 weeks' notice and an additional 4 employees abandoned their jobs by failing to report for work.[27] All were ineligible for rehire. None were rehired by the Respondent. In light of this clear and uncontradicted evidence, we find that the Respondent also would have refused to rehire Mullanix-Ackerman even in the absence of her union activity.

In finding that the Respondent failed to meet its *Wright Line* burden, the judge stated that she found the refusal to rehire Mullanix-Ackerman "difficult to understand" because, in the judge's view, it was not justified by financial or patient care considerations.[28] However, "it is well established that the 'Board does not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated." *Framan Mechanical*, 343 NLRB 408, 417 (2004) (quoting *Ryder Distribution Resources*, 311 NLRB 814, 816 (1993)).

This same rationale applies to the dissent, which creates an unsubstantiated exception from the Respondent's no-rehiring policy for someone like Mullanix-Ackerman who attempted to rescind her resignation within an hour of abandoning work. The Respondent has chosen a "bright line" policy of designating any employee who has resigned without providing 2 weeks' notice as ineligible for rehire. While the particular circumstances in which other employees resigned without notice may differ from those in Mullanix-Ackerman's case, the result in each was the same: the employee was designated as not eligible for rehire.[29] Absent any evidence of disparate treatment—and there is none—the Respondent was entitled to rely on this evidence to meet its *Wright Line* rebuttal burden even though the other employees did not attempt to rescind their resignations.

Furthermore, there is evidence of one attempted rescission effort comparable to that of Mullanix-Ackerman, which supports the Respondent's defense. In April 2000, employee Kathleen Beckett[30] left a message on her supervisor's answering machine stating that she would not be coming back to work. Later that same day, she called Beck and asked if he could arrange to get her back on the job. Beck refused, citing "the situation between her and her supervisor." We recognize that Beck did not specifically cite Beckett's ineligibility for rehire as the reason for not rehiring her. However, Beck's single statement does not refute the policy under which Beckett would not have been eligible for rehire in any event. Like Mullanix-Ackerman and others who quit without giving 2 weeks' notice, Beckett's termination

[25]. We do not, however, rely on the judge's finding that the timing of the refusal to rehire Mullanix-Ackerman, shortly before the election, supports an inference that Mullanix-Ackerman's support for the Union was a motivating factor. Mullanix-Ackerman dictated the timing of events herself by first resigning at the conclusion of a lawful discussion of her job performance and then attempting to rescind her resignation. We also do not rely on the judge's finding that Johnson's statement that Mullanix-Ackerman was a know-it-all who led the other technician around by the nose can only be understood as references to her support for the Union. On its face, the comment is adequately explained by the complaints made by other employees about Mullanix-Ackerman.

[26] Our dissenting colleague asserts that Mullanix-Ackerman's "resignation statement was precipitated by harassment that would not have occurred but for her union activity." However, this was the General Counsel's theory of constructive discharge, which the judge dismissed. Because no exceptions were filed to that dismissal, our colleague's claim, like the dismissed complaint allegation, is not viable.

[27] The Respondent produced termination reports created contemporaneously with the termination of these employees. Each report contained a box to mark "yes" or "no" as to the employees' eligibility for rehire. In every case, the box marked "no" was checked.

[28] As the dissent notes, Mullanix-Ackerman received a service award "in recognition of your fine performance" at about the time she resigned. However, Martinez testified that she issues those certificates solely for years in service and not for performance. As discussed above, moreover, the record shows that Mullanix-Ackerman had performance problems.

[29] The termination reports for the 10 employees not eligible for rehire include an employee who walked away from work and never returned, an employee who turned in his ID badge and keys after a request for part-time work was turned down, an employee who called her supervisor and notified her that she was resigning from her position because she did not feel that she was a good employee, and an employee who quit after stating that she did not feel that she was part of a team.

[30] CEO Beck testified that Beckett was, at the time, his son's fiancée.

report shows she was designated as ineligible for rehire. Further, Beck's testimony makes clear that the "outcome" when Beckett "walked off the job" was that she was "un-rehirable." The Respondent's refusal to allow Beckett to rescind her resignation is therefore consistent with its treatment of Mullanix-Ackerman.

Our dissenting colleague asserts that the Respondent's defense is undercut because Nursing Director Burkhardt did not immediately invoke the rehire policy when Supervisor Johnson reported that Mullanix-Ackerman had resigned. Instead, Burkhardt told Johnson that she would discuss the matter with CEO Beck and human resources and they would "take it from there." We see nothing unusual about Burkhardt's response to a report of this nature from a front-line supervisor. Insuring that the matter was handled with upper management's approval is standard fare, and we reject as unsupported speculation the insinuation that the involvement of "higher-ups" demonstrates that what followed was unlawfully motivated, or that the Respondent was not following its established policies.

Accordingly, for all of the foregoing reasons, we find that the Respondent did not violate the Act by refusing to allow Mullanix-Ackerman to rescind her resignation.

B. Representation Issues

The stipulated election agreement provided for two voting groups comprised of professional and nonprofessional employees. In the professional unit, the tally of ballots showed three for and five against on the issue of inclusion with the nonprofessional employees for purposes of collective bargaining, and two for and six against on the issue of representation by the Union, with five determinative challenged ballots. In the nonprofessional unit, the tally of ballots showed 65 for and 65 against representation, with 5 determinative challenged ballots.

There are no exceptions to the judge's recommendations that, in the professional unit, the challenge to the ballot of Lynda Locke be sustained and the challenges to the ballots cast by Lynn Classen and Maryanne Woodford be overruled. The Respondent has excepted to the judge's recommendation that the ballots cast by Beth Bartel and Janeel Welburn be sustained. We adopt the judge's recommendation as to Welburn but, for the reasons stated below, reverse the judge and overrule the challenge to the ballot cast by Bartel.

There also are no exceptions to the judge's recommendation that, in the nonprofessional unit, the challenges to the ballots cast by Grasiela Sanchez and Maria Rodriguez be overruled and the challenge to the ballot cast by Graciela Navarro be sustained. In light of our finding that the Respondent lawfully refused Mullanix-Ackerman's request to rescind her October 4 resignation, we sustain the challenge to her ballot. For the reasons stated below, we reverse the judge and also sustain the challenge to the ballot cast by Barbara Bensen.

1. Beth Bartel

The judge found that utilization review nurse Bartel was a managerial employee because she "effectuates the fundamental policy of the hospital of maximizing reimbursement for patient care" and "addresses deviations from [insurance] reimbursement standards with the treating doctors." While these are among Bartel's duties, we find, contrary to the judge, that they do not establish that she is a managerial employee.

Managerial employees are those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, utilizing discretion within, or even independently of, established employer policy. *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). The party asserting managerial status has the burden of proving it. *Union Square Theater Management*, 326 NLRB 70, 71 (1998). Here, Bartel neither formulates nor effectuates management policies. Instead, her primary responsibility is to insure that the hospital provides care that is reimbursable by insurers by reviewing patient charts to determine whether the treatment provided and length of stay are consistent with established utilization guidelines. Bartel plays no role in the formulation of the guidelines, which were developed by an outside company and approved by the Respondent's medical staff for its use. Bartels also plays no role in the effectuation of these management policies. When a treating physician departs from utilization guidelines, Bartel requests a justification. If the justification does not satisfy the guidelines, a physician review process is triggered. However, Bartel does not have the authority to enforce the guidelines and cannot direct the level of care provided to any patient. For these reasons, we find that she is not a managerial employee. See *Trustees of Noble Hospital,* 218 NLRB 1441, 1444 fn. 10 (1975) (utilization review coordinator held not a managerial employee).

2. Barbara Bensen

The parties' stipulated election agreement excludes "employees who do not regularly average four or more hours per week in the 13 weeks preceding the payroll cut-off date for eligibility." During the 13-week period leading up to the election eligibility date, ultrasound technician Barbara Bensen averaged 3.96 hours of work per week. Applying the agreed upon formula to the instant case, the judge found that Bensen's average of

3.96 hours of work per week, when rounded up to 4 hours worked, satisfied the stipulated 4-hour requirement. We disagree.

The Board's role in situations where the parties have stipulated to an election agreement is limited. *Desert Hospital v. NLRB*, 91 F.3d 187, 192 (D.C. Cir. 1996). The Board must only ensure that the stipulated terms do not conflict with fundamental labor principles, and having done so, the Board must then enforce the agreement. Id. Here, the agreement excludes "employees who do not regularly average four or more hours per week in the 13 weeks preceding the payroll cut-off date for eligibility." During the eligibility period Bensen did not average 4 or more hours per week. She averaged 3.96 hours per week. Consequently, under the clear terms of the stipulation, Bensen was ineligible to vote. There is no support for the view that an employee's hours worked may be rounded up for the purpose of determining voting eligibility and we decline to create such a rule for the purpose of deciding this case. Accordingly, we sustain the challenge to the ballot Bensen cast in the election.[31]

3. Consistent with these findings, we shall remand the representation case to the Regional Director for the purpose of opening and counting the ballots of employees Lynn Classen, Maryanne Woodford, Beth Bartel, Grasiela Sanchez, and Maria Rodriguez and issuing a revised tally of ballots. If a majority of employees in the professional unit have voted for inclusion in the nonprofessional unit, then the ballots of the two voting groups shall be counted together on the issue of representation by the Union. If the professional employees have not voted for inclusion, then the ballots cast by the two voting groups shall be counted separately. In either case, the Regional Director shall issue the appropriate certification of representative if a majority of the valid ballots cast are in favor of representation. In the event that the Union does not receive a majority, we find for the reasons stated in the judge's decision that the election must be set aside and a new election held at such time as the Regional Director deems appropriate.[32]

ORDER

The National Labor Relations Board orders that the Respondent, Southern Monterey County Hospital d/b/a George L. Mee Memorial Hospital, King City, California, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their union and protected concerted activities and the union and protected and concerted activities of their fellow employees.

(b) Creating the impression of surveillance of employees' union activities.

(c) Threatening employees with discharge or other unspecified reprisals for supporting the Union.

(d) Offering employees financial aid or other benefits to discourage them from supporting the Union.

(e). Prohibiting employees from wearing union insignia.

(f) Maintaining a ban on talking about the Union during work hours.

(g) Accusing employees of disloyalty because of their union activities.

(h) Maintaining and enforcing an overly broad no-solicitation, no-distribution rule for employees.

(i). Maintaining and enforcing an overly broad anti-loitering rule.

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

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

(a) Delete and expunge from its policy and procedure manual and from any other documents where such rules may be contained, the no-solicitation, no-distribution rule, as it applies to employees, and the antiloitering rule.

(b) Within 14 days after service by the Region, post at its facility in King City, California, copies of the attached notice marked "Appendix."[33]

[31] For the reasons stated by the judge in her decision, we reject the Charging Party's alternative argument that Bensen's standby time should be counted as hours of work. *Five Hospital Homebound Elderly Program*, 323 NLRB 441 (1997), and *Riverside Community Memorial Hospital*, 250 NLRB 1355, 1356 (1980), cited by the Charging Party in support of its position that standby time should be counted, are distinguishable. In *Five Hospital*, the Board held that an employee's time completing paperwork, travel time, and time spent in meetings should be counted as hours of work for the purpose of determining her election eligibility. Likewise, in *Riverside,* the Board found that an employee was eligible based on her "hours of actual work." Standby time was not counted as time worked in either case.

[32] In finding that the Respondent engaged in objectionable conduct warranting setting aside the election results, the judge relied in part on *Spring Industries*, 332 NLRB 40 (2000), where the Board held that threats of plant closure are presumed to be disseminated in the absence of evidence to the contrary. We note that subsequent to the judge's decision, the Board overruled the *Spring Industries* presumption of dissemination in *Crown Bolt, Inc.*, 343 NLRB 776 (2003) (Members Liebman and Walsh dissenting in pertinent part), but it did so prospectively only, i.e. to events occurring after the issuance of *Crown Bolt.*

[33] 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

Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 July 1999.

(c) 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.

DIRECTION

IT IS FURTHER ORDERED that Case 32–RC–4664 is severed from Case 32–CA–17687–1 and remanded to the Regional Director for Region 32 for the purpose of opening and counting the ballots cast by Lynn Classen, Maryanne Woodford, Beth Bartel, Grasiela Sanchez, and Maria Rodriguez, issuing a revised tally of ballots, and for further action consistent with this opinion.

MEMBER WALSH, dissenting in part.

I agree with my colleagues with respect to the resolution of most of the unfair labor practices and all of the ballot challenges. Contrary to my colleagues, however, I would affirm the judge's findings that: (1) Chief Executive Officer Walter Beck unlawfully solicited grievances and impliedly promised to remedy them; (2) Medical/Surgical Intensive Care Unit Coordinator Virginia Rojas unlawfully interrogated employees Natividad Felix and Henrietta Perez; (3) the Respondent unlawfully refused to allow surgical technician Carla Mullanix-Ackerman to withdraw her resignation; and (4) the Respondent violated the Act by maintaining a policy prohibiting solicitation and distribution by nonemployees on its premises.

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."

I. SOLICITATION OF GRIEVANCES

A. Facts

The Respondent had committed numerous unfair labor practices leading up to the October representation election. At the start of a staff meeting held 5 days before the commencement of the election, Medical/Surgical Intensive Care Unit Coordinator Rojas told the employees that she could not believe that they were attempting to unionize and that she thought "we had no problems." She then asked the employees what they thought the Union could offer them and why they had not come to her first, and told them that "we can't solve departmental problems" unless she knew about them.

Following Rojas' remarks, Beck, the Respondent's CEO, and Raye Burkhardt, the director of nursing, joined the meeting. Beck told the employees that he and Burkhardt were there to ensure that the employees had the appropriate information and to answer their questions or concerns. He invited the employees, as the judge found, "to open up and talk" to him, and told them that "if there were problems they could solve, they should speak" to him. Although Beck told the employees that he could not make any promises, he told them that he had "an open door" if there were any more questions.

In fact, the Respondent had no previous open-door policy. Indeed, Beck had never before addressed the employees or even attended a staff meeting.

B. Analysis and Conclusion

The Board has recently rearticulated the following well-established principles regarding the solicitation of grievances and the implied promise to remedy them:

> [I]n the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizational campaign violates the Act when the employer promises to remedy those grievances. See, e.g., *Uarco, Inc.*, 216 NLRB 1, 2 (1974). The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. This inference is particularly compelling when, during a union organizational campaign, an employer that has not previously had a practice of soliciting employee grievances institutes such a practice. *Amptech, Inc.*, 342 NLRB No. 117 [1131,], slip op. at 6–8 [1137] (2004).

Center Service System Division, 345 NLRB 729, 730 (2005).

In the present case, Beck invited the employees "to open up and talk" to him about problems they could solve, and, as my colleagues assume arguendo, that invitation was a solicitation of grievances. That

solicitation, in turn, raises a rebuttable inference that Beck was unlawfully promising to remedy the employees' grievances. The inference is particularly compelling because here, the Respondent did not have a past practice of soliciting grievances: Beck announced it just days before the election.

In spite of all this, my colleagues find that the Respondent rebutted the inference that it was promising to remedy the grievances—the "problems they could solve"—that Beck solicited at the meeting. I disagree.

My colleagues rely heavily on the fact that Beck made no express promises at the meeting and, indeed, stated that he could not. But that does not end the inquiry, for the Respondent committed an unfair labor practice if Beck *impliedly* promised to remedy the grievances that he solicited. The judge reasonably found that he did. As the judge observed, Beck's presence at the meeting was a direct response to the union campaign, and there was no precedent for his asking any questions of employees, let alone for his inviting them to open up and to talk about solving problems together. In the circumstances, it would be reasonable for the employees to understand Beck's statements as an implied promise to remedy their concerns, particularly coming on the heels of Rojas' telling them earlier in the meeting that "we can't solve departmental problems" unless she knew about them.[1] The fact that Beck stated that he could not make promises did not negate that implied promise. See *Michigan Products, Inc.*, 236 NLRB 1143, 1146 (1978).[2]

[1] My colleagues state that Rojas' earlier statement has no bearing on determining whether Beck subsequently unlawfully promised to remedy grievances. I disagree. Although, as my colleagues point out, Rojas' statement was not itself alleged as an unfair labor practice, it nevertheless set the stage for Beck's unlawful solicitation of grievances and implied promise to remedy them. Contrary to my colleagues' further assertion, the fact that Beck was not in the room when Rojas made her remarks is not material. Whether Beck's statements rose to the level of a solicitation of grievances and implied promise to remedy them is determined from the listeners' point of view.

[2] My colleagues note that *Michigan Products* did not involve the solicitation of grievances. That is correct. It involved an employer's hollow disclaimers of making promises, like Beck's disclaimers here.

My colleagues' affirmative reliance on *Uarco, Inc.*, supra, 216 NLRB 1, is unavailing, for that case is distinguishable on its facts. There, the employer solicited grievances from employees in a series of meetings. In response to those solicitations, the employees complained principally about the lack of communication between management and the work force, and about the ineffectiveness of the "shop committee" in establishing such communication. In response, the employer, unlike the Respondent here, repeatedly told the employees that the efficacy of the shop committee depended on *their* efforts, and that the employer could make no promises about any of the grievances raised by the employees. It was in that context, and with express reference to "the circumstances of the case," that the Board stated that the employer had, by the "express 'no promise' responses to the employees' complaints," negated any inference of a promise of benefits. 216 NLRB at 2. The case does not stand for the proposition that an employer's mere utterance of "no promises" will inoculate it against an unfair labor practice finding.

II. INTERROGATIONS OF FELIX AND PEREZ

A. Background

Prior to the October 6 interrogations at issue here, Medical/Surgical Intensive Care Unit Coordinator Rojas committed numerous unfair labor practices, including several targeted at employees Felix and Perez. For example, in August, Rojas coercively interrogated Perez, whom she supervised, about her knowledge of and interest in the Union. After Perez attempted to answer Rojas' questions, Rojas told Perez that union people were "thugs" and "thieves." During that same conversation, Rojas gave Perez the impression that her union activities were under surveillance and threatened her with discharge by telling her that she and her son were union "ringleaders," and warning her that their jobs were "on the line." Then, in September, Rojas angrily accused medical/surgical unit secretary Felix, Perez, and other employees of being liars and backstabbers, because they had told her that they were not involved with the Union but had actually signed union petitions. Contemporaneously, Rojas threatened Felix, Perez, and the other employees present that if they went on strike, they could lose their jobs. A few days before the October 6–7 election, Rojas unlawfully forbade employees from wearing union buttons. And on numerous occasions, Rojas unlawfully told the employees that they were not allowed to talk about the Union at work. Finally, on October 7, the day after the interrogations of Felix and Perez at issue, Rojas again called Felix and Perez and other employees backstabbers, told employees that she wanted to hear nothing more about the Union, and declared that she did not ever want to see Felix or Perez, thereby conveying the unlawful message that support for the Union was an act of disloyalty towards Rojas, and by implication towards the Respondent itself.

B. Interrogations of Felix and Perez

On October 6, the first day of the election, and against the backdrop of almost constant unlawful activity by Rojas, Rojas approached Felix at the nurses' station in their unit. Rojas was carrying a union flier that showed Felix's picture, named her as a member of the Union's organizing committee, and quoted her as saying:

> I'm supporting the union for better working conditions and quality of care. With a union, we'll be able to negotiate our benefits package based on our needs.

Rojas had circled Felix's photograph. Rojas angrily asked Felix what she meant by her statement. Felix replied that the employees needed the Union to get good wages and benefits.

That same day, in Rojas' office, Rojas showed Perez the union flier, which also contained a prounion statement from Perez. Rojas had circled the statement, as well as the photograph of two other employees. Rojas asked Perez to explain her statement. Perez replied that she wanted a union for job security and so that she would be treated with respect. Rojas then unlawfully threatened Perez with discharge by telling her that Rojas had been told to get rid of Perez, but that Rojas was not going to do that, because Perez was a hard worker.

C. Analysis and Conclusions

In determining whether Rojas' October 6 interrogations of Felix and Perez were unlawful, examination of all the circumstances is required in order to determine whether the questioning reasonably tended to restrain, coerce, or interfere with protected rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom. *Hotel Employees & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Factors that may be considered in analyzing alleged interrogations of open union supporters include the background against which the questioning occurs, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. Id. at 1178 fn. 20. See also *NLRB v. Camco, Inc.*, 340 F.2d 803, 804 (5th Cir. 1965) (other relevant factors are whether the questions have a valid purpose, whether that purpose is communicated to the employee, and whether the questioner assures the employee that no reprisals will be taken), cert. denied 382 U.S. 926. Applying that test, there can be little doubt that Rojas' interrogations were coercive, and therefore violated Section 8(a)(1) of the Act.

As shown above, the background against which these interrogations took place was replete with the Respondent's unfair labor practices, many of them committed by Rojas and targeted at Felix and Perez in particular.[3] Indeed, prior to these October 6 interrogations, Rojas had repeatedly demonstrated that she was willing, if not eager, to violate the Act on behalf of the Respondent in order to coerce the workforce into rejecting the Union. Other supervisors had also threatened employees or interrogated them about their own or other employees' union activities.

In other words, when Rojas angrily confronted Felix and Perez on October 6, she was demanding that they defend their support for the Union at a time when the Respondent, and Rojas in particular, was committed to defeating the Union by unlawful means. Perez' interrogation was immediately followed by Rojas' threatening her with discharge.[4] Rojas did not advise Felix or Perez of any legitimate reason for the questioning—there was none—and did not tell them that they did not need to answer her questions, or give them assurances that they would not be subject to retaliation as a result of their answers.[5] In short, a consideration of the relevant factors strongly supports the judge's determination that the interrogations were coercive, and the status of Perez and Felix as open Union supporters does not undercut that finding, which I would affirm.[6]

III. REFUSAL TO ALLOW WITHDRAWAL OF RESIGNATION

A. Background

Carla Mullanix-Ackerman was a surgical technologist/surgical department secretary and a member of the Union's organizing committee. She testified without contradiction that she was vocal in her support for the Union. In addition, Mullanix-Ackerman signed several union leaflets that were widely distributed throughout the hospital. One leaflet identified her as a member of the union organizing committee, and two others quoted her by name making statements in support of the Union. Director of Nursing Burkhardt acknowledged knowing that Mullanix-Ackerman was one of the leaders of the union campaign.

On August 5, not long after Mullanix-Ackerman became a member of the union organizing committee, her supervisor, Margaret Johnson, unlawfully interrogated her about her past and current union membership, and about why she wanted a union at the

[3] See, e.g., *High Point Construction Group*, LLC, 342 NLRB 406, 412 (2004), enfd. sub nom. *Mid-Atlantic Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America v. NLRB,* 135 Fed.Appx. 598 (4th Cir. 2005) (interrogation unlawful where, inter alia, it occurred at a time when the respondent was committing numerous other unfair labor practices); see also *Systems West LLC,* 342 NLRB 851, 857 (2004) (same).

[4] *Medcare Associates, Inc.*, 330 NLRB 935, 940 (2000) ("[A] question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone."); see *Jefferson Smurfit Corp.*, 325 NLRB 280, 285 (1998) (interrogation unlawful where, inter alia, the respondent engaged in other unfair labor practices both before and after the interrogation); *Stoody Co.*, 320 NLRB 18 (1995) (same).

[5] *Norton Audubon Hospital*, 338 NLRB 320, 321 fn. 6 (2002).

[6] *Assn. of Community Organizations for Reform Now (ACORN)*, 338 NLRB 866, 870 (2003) (supervisory questioning regarding the reasons underlying employees' sentiments about the Union held to be coercive, notwithstanding the employees' open support for the union); see generally *Rossmore House*, supra at 1178 fn. 20 (Board will weigh the setting and nature of interrogations involving open and active union supporters).

hospital. After Mullanix-Ackerman told Johnson that she had previously belonged to a union, Johnson unlawfully threatened her that jobs might be lost due to cutbacks if a union got in.

During the following month, Supervisor Denise Miller took the Respondent's interrogation of Mullanix-Ackerman one step further by first asking her if her opinion about the Union had swayed and then unlawfully asking her whether *other* employees' opinions about the Union had changed. Mullanix-Ackerman's employment with the Respondent came to an abrupt end a few weeks later.

B. Facts

Mullanix-Ackerman's regular work shift was 7 a.m. to 3:30 p.m. Most mornings, she worked in the operating room, directly assisting surgeons. Scheduled surgeries were usually completed by 1 or 2 p.m. In the afternoons, Mullanix-Ackerman usually sterilized the instruments that would be needed for the following morning's surgeries.

Around 2 p.m. on October 4, Johnson took Mullanix-Ackerman into a vacant office for an informal meeting. Johnson told Mullanix-Ackerman that Mullanix-Ackerman could change the whole mood of the department and that, because of Mullanix-Ackerman, four of the five nurses in the department no longer wanted to work in that department. Mullanix-Ackerman became, according to her own testimony, "a little nervous." Johnson told Mullanix-Ackerman that Mullanix-Ackerman was "leading" fellow employee Laura Williams, and thinking for her. Mullanix-Ackerman denied that. Johnson told Mullanix-Ackerman that Mullanix-Ackerman acted like a "know-it-all." Mullanix-Ackerman denied that, too, pointing out to Johnson that all of the surgery department staff members were registered nurses (RNs) *except* Mullanix-Ackerman and Williams, who were only surgical technologists. Johnson also told Mullanix-Ackerman that her work in stocking and instrumentation was not up to par. Johnson then told Mullanix-Ackerman that Johnson was going to dock Mullanix-Ackerman a half-hour's emergency call-back pay for failing to complete her work tasks following a 3 p.m. unscheduled surgery on Saturday, September 25, and for putting in for 2 hours of call-back pay although she did not work a full 2 hours. Mullanix-Ackerman protested that the standard practice was to pay surgery technologists for a minimum of 2 hours on an emergency call-back. Johnson responded that that was a "gift" from the nursing staff, one that was freely given and that could be taken away.[7] This was the first time that Mullanix-Ackerman was told that she was not entitled to a minimum of 2 hours of emergency call-back pay.[8]

At that point in the meeting, Mullanix-Ackerman was stunned and upset by Johnson's accusations and the reduction of her call-back pay for September 25, and she told Johnson, "I quit." Johnson replied "well, if that's how it is." Mullanix-Ackerman then left the room, changed out of her uniform, and returned to the surgery department. Nurse Laurel Cheney asked Mullanix-Ackerman what was wrong, and Mullanix-Ackerman replied: "That's it. I quit." Johnson heard that statement, and said that it did not have to be that way. But Mullanix-Ackerman left the hospital at about 2:30 p.m., with about an hour still left on her shift. She was also scheduled to be on call for emergencies from 3:30 p.m. that afternoon through 7 a.m. the following morning.

Johnson testified that this meeting with Mullanix-Ackerman was not intended to be a disciplinary meeting, and also that nothing that Mullanix-Ackerman did in the meeting itself warranted discipline. Shortly after Mullanix-Ackerman left the hospital, Johnson reported the incident to Burkhardt. Burkhardt told Johnson that Burkhardt was going to discuss the matter with CEO Beck and Director of Human Resources Joyce Martinez, and that they would "take it from there."

Within an hour of quitting, Mullanix-Ackerman had changed her mind. She returned to the hospital and spoke with the chief of staff, Dr. Leo Graupera. She told him that she had quit in an emotional state and had not given her resignation, and she asked him for his help in getting her job back. He told her that he would help her, that she should go home, and that he would speak to Director of Nursing Burkhardt. (Dr. Graupera was an independent contractor and had no authority directly to allow Mullanix-Ackerman to withdraw her resignation.) Dr. Graupera spoke to Burkhardt later that afternoon. He told her that Mullanix-Ackerman was a good worker, that he enjoyed working with her, and that she regretted quitting. Burkhardt replied that by leaving work earlier that afternoon with an hour left on her shift, Mullanix-Ackerman had "abandoned her post," which was totally unacceptable, and that Mullanix-Ackerman's resignation would be accepted.

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[7] Art. 6, *Stand-By and Call-Back Time*, of the Respondent's collective-bargaining agreement with the California Nurses Association (CNA) covering the Respondent's RNs required payment of a minimum of 2 hours call-back pay. Apparently, the Respondent established that practice for the unrepresented surgical technologists, as well.

[8] In accordance with the established practice, Mullanix-Ackerman had always submitted claims for the 2-hour minimum when she worked a shorter emergency call-back period (about once per month), and her supervisors, including Johnson, had always routinely approved those claims—until October 4.

The following morning, Mullanix-Ackerman returned to the hospital at 7 a.m. and met right away with Johnson. She told Johnson that she thought the situation could be worked out, that she wanted to continue working at the hospital, and she asked Johnson what Mullanix-Ackerman could do to make things right. Johnson refused to discuss the matter with her, and told her to speak to Burkhardt. She went directly to see Burkhardt, who was not there at the moment. Mullanix-Ackerman returned a little later and met with Burkhardt. She told Burkhardt that she wanted to return to work, that she felt that she was an asset to the hospital, and that she felt that the situation could be worked out. In response, Burkhardt presented Mullanix-Ackerman with a letter dated the day before, October 4, addressed to Mullanix-Ackerman, signed by Johnson (but actually written by higher management), that stated in pertinent part:

> This letter will serve to document our discussion this afternoon [October 4] and to formally accept your resignation without notice from [the Respondent].

The letter closed:

> Carla, I wish you all the best in your future endeavors. Please do not hesitate to contact the Human Resources Department . . . if you have any questions or concerns in regard to your voluntary termination.

Burkhardt then told Mullanix-Ackerman that her resignation was accepted, her paycheck was in the mail, she did not have to see human resources, and that Burkhardt wished Mullanix-Ackerman "well."

In response to Johnson's October 4 letter, Mullanix-Ackerman wrote a letter dated October 5 and addressed to CEO Beck, Dr. Graupera, Burkhardt, Johnson, the Union, and the National Labor Relations Board, stating in pertinent part that it was not her intention to resign and that she wished to remain an employee of Mee Memorial Hospital. She also stated in the letter that during her meeting with Johnson on October 4, she was "accused [of] negatively impacting the department because of my personality." The letter continues:

> In a moment of frustration I told my supervisor that I quit, but [I] rescinded this decision with Chief of Staff Leo Graupera, who advised me that he would discuss this with Director of Nursing Raye Burkhardt the next day. . . . I hope this matter can be resolved so that I may return to work as soon as possible.

Mullanix-Ackerman had never been the subject of any discipline during her 4-year employment with the Respondent.[9]

Burkhardt made the final decision not to allow Mullanix-Ackerman to withdraw her resignation. At the time she did so, she knew that Mullanix-Ackerman was one of the leading employee supporters of the Union.

C. Applicable Principles

To establish a violation of Section 8(a)(3) and (1), the General Counsel must prove, by a preponderance of the evidence, that the employee's protected conduct was a substantial or motivating factor in the employer's adverse action.[10] The General Counsel can demonstrate discriminatory motivation by showing that the employee engaged in union activity, that the employer knew about it, and that the employer had animus toward it.[11] Once the General Counsel makes that showing, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.[12]

D. Analysis and Conclusion

My colleagues assume arguendo, and I find, that Mullanix-Ackerman's union activity was a motivating factor in the Respondent's decision not to allow her to withdraw her resignation—or, as my colleagues characterize it—not to rehire her. Thus, the only issue is whether the Respondent has established that it would have acted as it did towards Mullanix-Ackerman even in the absence of her union activity.

My colleagues say yes, because the Respondent's treatment of Mullanix-Ackerman was assertedly consistent with its policy of classifying employees who resign without giving the Respondent 2 weeks' advance notice as ineligible for rehire. My colleagues state that none of the employees who were classified as ineligible for rehire under this policy were rehired. That is true so

[9] Ironically, in fact, shortly before finally refusing to let Mullanix-Ackerman withdraw her resignation on October 5, the Respondent had prepared a formal award certificate for Mullanix-Ackerman, signed by CEO Beck and predated October 9, honoring her fine performance, stating:

Mee Memorial Hospital Service Award
In Honor and Recognition of Your
Fine Performance
We hereby present this
Certificate to
Carla Mullanix
For Four years of Service

[10] *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982); *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996).

[11] See, e.g., *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

[12] *Wright Line*, supra, 251 NLRB at 1089.

far as it goes. But prior to the events in question, none of those employees had even *sought* rehire. There is evidence of only one employee who, in April 2000, 6 months *after* the events in question, quit without giving 2 weeks' notice and then sought rehire. As discussed below, she was turned down, but *not* because of the Respondent's rehire policy.

My colleagues contend that I do not appropriately defer to the Respondent's choice of a "bright-line" rule to govern the rehire of former employees. That is incorrect. Rather, I question whether the policy even applied to a situation like this one, the attempted withdrawal of a resignation. The Respondent had never before been faced with the situation presented by Mullanix-Ackerman on October 4 and 5: a valued, long-term employee who impulsively quit without giving advance notice, but who then tried to withdraw her resignation *almost immediately after submitting it*.

Although Mullanix-Ackerman's conduct can be characterized, as the majority does, as her seeking to be rehired, it is more accurately and realistically viewed simply as the attempt to withdraw her 1-hour-old resignation. None of the Respondent's evidence shows that the rehire policy was intended to cover that circumstance. Accordingly, the mere invocation of that policy does not establish that the Respondent would have denied Mullanix-Ackerman's attempt to withdraw her resignation in the absence of her open and active union leadership role.

My colleague's resolution of this issue fails utterly to take into account the context of Mullanix-Ackerman's conduct. The interaction between Mullanix-Ackerman, a prominent union supporter, and her supervisor, Johnson, occurred 2 days before the start of the election. As shown above, Johnson badgered Mullanix-Ackerman regarding her influence on other employees. Johnson then criticized Mullanix-Ackerman's work performance. Following that, Johnson informed Mullanix-Ackerman that she was docking her pay, when Mullanix-Ackerman had simply followed standard procedure in putting in for the 2-hour minimum. In the circumstances, it is apparent that Johnson was attempting to coerce and punish Mullanix-Ackerman on account of her union activities. It is also clear that Mullanix-Ackerman's resignation statement was precipitated by harassment that would not have occurred but for her union activity, and that the Respondent would have permitted her to withdraw the resignation absent her union activity.

Putting context aside, however, there is clear evidence that the Respondent's treatment of Mullanix-Ackerman was not simply the application of the rehire policy. As shown above, after Mullanix-Ackerman quit, Johnson reported the matter to Burkhardt, the director of nursing. Burkhart told Johnson that she was going to discuss the matter with CEO Beck and the director of human resources, and that they would "take it from there." But if all that was called for was the application of an established and consistently applied rehire policy, there would have been no need at all for the involvement of higher-ups. Accordingly, Burkhart's remark establishes that something else was going on, and I agree with the judge that it was consideration of Mullanix-Ackerman's union activity.

Finally, the majority's reliance on employee Kathleen Beckett's attempted withdrawal of her resignation in April 2000 does not advance its case. The Beckett incident, the only other attempted resignation withdrawal the majority can point to, occurred 6 months after the Mullanix-Ackerman incident. There was no evidence that her resignation was either provoked or impulsive; Beckett, who at the time had been working for the Respondent for only 1 month, simply called in and left a message on her supervisor's voicemail that she was resigning. Notably, CEO Beck, who testified regarding the incident, told Beckett at the time that he was turning down her withdrawal request because of "the situation between her and her supervisor." Beck did not tell Beckett that he was turning down her request because of the rehire policy, nor did he claim that he relied on the policy when he testified regarding his decision. In sum, the Respondent's treatment of Beckett does not support its claim that it would have declined to rescind Mullanix-Ackerman's resignation in the absence of her union activity. Rather, if it shows anything at all, the Respondent's treatment of Beckett shows that its rehire policy did not apply to an attempted withdrawal of a resignation.

It is clear from all of the above evidence that the Respondent has not established that, in the absence of Mullanix-Ackerman's activity on behalf of the Union, the Respondent would have applied its rehire policy to deny her request to withdraw her 1-hour-old, impulsive resignation. I would, therefore, affirm the judge's finding that the Respondent's decision to refuse to allow her to return to work was motivated by antiunion animus, and therefore violated the Act.

IV. NO-SOLICITATION/NO-DISTRIBUTION POLICY

A. Facts

It is undisputed that the Respondent maintained the following policy at all relevant times:

> Under no circumstances will Hospital employees and non-employees be permitted to solicit or distribute

written materials for any purpose on the Hospital premises.

The majority affirms the judge's finding that maintenance of this policy with respect to employees was unlawful, but finds, contrary to the judge, that it was lawful as it applied to nonemployees. I would affirm both of the judge's findings.

Notwithstanding the Moscone Act[13] and the interpretation given that it by the Supreme Court of California in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,[14] the majority states that an employer in California has the right to exclude nonemployees engaged in publicizing a labor dispute from the private sidewalks in front of its premises. Quoting the Board's decision in *Macerich Management. Co.*, 345 NLRB 514 (2005), the majority states that the United States Court of Appeals for the District of Columbia Circuit, in *Waremart Foods v. NLRB*, 354 F.3d 870 (2004), held that *Sears* "cannot be relied on as controlling California precedent." *Macerich*, at 517.

Although I do not take issue with the District Circuit's authority to answer questions of state law in order to decide cases before it, neither a California court nor the Board is bound by that answer. In the absence of an authoritative ruling by the Supreme Court of California or the Supreme Court of the United States, I would defer to the holding in *Sears*.

Mere maintenance of a rule excluding persons can have a chilling effect. Because, like the judge, I read the relevant California law as barring property owners from excluding labor picketers and pamphleteers from the sidewalks bordering their premises, I would find that the Respondent's maintenance of the restrictions on nonemployees to be overbroad, and therefore unlawful.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf through representatives

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you concerning your union activities or the union activities of other employees.

WE WILL NOT imply that your union activities will be under surveillance.

WE WILL NOT threaten you with discharge or other unspecified reprisals because of your and other employees' support for the Union.

WE WILL NOT offer you financial aid or other benefits in order to discourage you from supporting the Union.

WE WILL NOT prohibit you from wearing buttons with union insignia.

WE WILL NOT inform you that you cannot talk about the Union during work hours.

WE WILL NOT accuse you of disloyalty because of your union activities.

WE WILL NOT maintain and enforce an overly broad no-solicitation, no-distribution rule as to employees.

WE WILL NOT maintain and enforce an overly broad antiloitering rule.

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

WE WILL delete and expunge from our Policy and Procedure manual and from any other documents where such rules exist, the no-solicitation, no-distribution rule, as it applies to employees, and the antiloitering rule.

SOUTHERN MONTEREY COUNTY HOSPITAL
D/B/A GEORGE L. MEE MEMORIAL HOSPITAL

Jeffrey L. Henze, Esq., for the General Counsel.

*Alan G. Crowley, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)***,** of Oakland, California, for the Petitioner/Charging Party.

*Robert M. Stone, Esq. (Musick (Peeler & Garrett LLP)***,** of Los Angeles, California, for Employer/Respondent and *Joyce Martinez, SPHR, MHRM,* Director of Human Resources, of King City, California, for Employer/Respondent.

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in King City, California on June 20, July 18–21 and 26, 2000. At issue are determinative challenged ballots and

[13] Cal. Civ. Proc. Code § 527.3 (West 1979). Among other things, the Moscone Act bars California courts from enjoining persons from publicizing a labor dispute.

[14] 25 Cal.3d 317 (1979). In *Sears*, the trial court enjoined a union from engaging in picketing on the privately owned sidewalk surrounding a Sears department store. Subsequently, the legislature passed the Moscone Act. The Supreme Court of California held that, under prior precedent and the Moscone Act, Sears' property right in the sidewalk did not encompass the right to exclude nonemployees engaged in peaceful picketing.

election objections which parallel unfair labor practice allegations.

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[1] and after considering the briefs filed by all counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Southern Monterey County Hospital, d/b/a George L. Mee Memorial Hospital (the Hospital or Respondent) is a California corporation with an office and place of business in King City, California, where it operates an acute-care hospital. Respondent derived gross revenues in excess of $250,000 and purchased and received goods valued in excess of $5000 which originated outside the State of California during the 12 months preceding April 25, 2000. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

It is admitted by Respondent and I find that Health Care Workers Union, Local 250, Service Employees International Union, AFL–CIO (SEIU or the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. UNFAIR LABOR PRACTICE CASE

The Union filed the unfair labor practice charge in Case 32–CA–17687–1 on September 21, 1999.[2] A first amended and a second amended charge followed on April 24 and 25, 2000. The amended complaint issued April 25, 2000.

A. Alleged Interrogation, Impression of Surveillance and Threat by Virginia Rojas

According to Henrietta Perez, activities director,[3] she spoke to her supervisor Virginia Rojas, medical/surgery intensive care unit coordinator, in Rojas' office in mid to late August. They initially discussed a work related matter. Then Rojas asked Perez if she knew anything about the Union. Perez said she did. Rojas asked why Perez wanted a Union. Perez explained that employees were not treated fairly, equally, or with respect. Additionally, Perez mentioned job security rather than being "at-will" employees. Rojas said that union people were thugs and thieves. Rojas identified Perez and her son as ringleaders and warned her that their jobs were on the line. Rojas denied telling Perez that she was a ringleader or telling Perez that her job and her son's job were on the line. Rojas explained that she did tell Perez that she had heard through the grapevine that Perez had brought the Union into the Hospital: "the word out there is that you're the one who brought the union here."

Counsel for the General Counsel contends that each question asked by Rojas was an unlawful interrogation, relying on *Beverly California Corp.,* 326 NLRB 153, 154–155 (1998) (supervisor told employees that he was aware they were organizing and asked them why they were starting problems noting that he had made himself available and would like to have been notified); *Pacesetter Corp.,* 307 NLRB 514, 517–518 (1992) (supervisor asked how employee felt about the union and what it could accomplish); *Kuna Meat Co.,* 304 NLRB 1005, 1013 fn. 2 (1991), enfd. 966 F.2d 428 (8th Cir. 1992) (unlawful to interrogate individuals about what occurred at a union meeting). Counsel asserts that accusing Perez and her son of being ringleaders constitutes an unlawful impression of surveillance, citing *Western Health Clinics,* 305 NLRB 400 (1991); *M. K. Morse Co.,* 302 NLRB 924 (1991). Finally, counsel argues that by telling Perez that their jobs were on the line, Rojas blatantly threatened termination in retaliation for union activities, citing *Portsmouth Ambulance Service,* 323 NLRB 311 (1997); *Ashland Oil Co.,* 199 NLRB 231 (1972).[4]

Counsel for Respondent argues that Perez intentionally altered the date of the conversation in order to bring it within the critical period and therefore should be discredited. Counsel also argues that even if Perez is credited, any such one-on-one conversation was de minimis, relying on *Clark Equipment Co.,* 278 NLRB 498, 505 (1986); *Caron International,* 246 NLRB 1120, 1120–1121 (1979).

Although Perez was, indeed, confused about the date of this conversation with Rojas, she was not confused about the content of the conversation and withstood extensive cross-examination without deviation from the substance as originally imparted. I credit her version of the exchange. As to the date of the conversation, I find that Perez finally concluded that the conversation occurred in mid to late August and I credit her recollection.[5]

At issue are alleged interrogation, impression of surveillance and threat of job loss. In determining whether the questions asked by Rojas were unlawful, examination of all the circumstances is required in order to determine whether the questioning reasonably tended to restrain or coerce or interfere with protected rights. *Rossmore House,* 269 NLRB 1176, 1177 (1984), enfd. sub nom. *Hotel Employees & Restaurant Employees Union, Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). Factors such as the background in which the questioning

[1] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[2] All dates are in 1999 unless otherwise referenced.

[3] Perez is an eligible voter in the nonprofessional unit.

[4] Counsel for the General Counsel also contends that Rojas' rhetorical question regarding what the Union could provide constituted a threat of futility, relying on *Hertz Corp.,* 316 NLRB 672, 686 (1995) (telling employees that union does not do anything for employees and that they have better benefits than unionized employees constitutes statement of futility in selecting union); *Heartland of Lansing Nursing Home,* 307 NLRB 152, 158 (1992) (union will not do anything for employees). This allegation is not contained in the amended complaint and will not be addressed.

[5] Counsel for the General Counsel moved to amend the complaint to reflect the witness' testimony that the conversation occurred in mid to late August. The motion is granted.

occurs, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation are considered. *Kellwood Co.,* 299 NLRB 1026 (1990), enfd. 948 F.2d 1297 (11th Cir. 1991). *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985), made clear that this analysis applies to all alleged interrogations rather than only to those involving open and active union adherents. Rojas' statements regarding Perez and her son being "ringleaders" must be examined to determine whether employees would reasonably assume from such a statement that their union activities have been placed under surveillance. Finally, the context of the alleged threat must also be examined to determine whether it was coercive.

Examining the totality of circumstances, it appears that Perez, who was not an open union adherent at the time of this conversation, spoke with her immediate supervisor in the supervisor's office. From the comments made regarding Perez being a "ringleader," it was reasonable to conclude that employees' union activities were under surveillance. Moreover, the warning that Perez and her son's jobs were on the line can only be interpreted as coercive. Examining the questions in light of these surrounding circumstances, I find that they reasonably tended to restrain, coerce, or interfere with union activity. Accordingly, I find that Rojas interrogated Perez, threatened Perez, and created the impression that Respondent was spying on employees' Union activities.

B. Alleged Threat of Unspecified Reprisals by Eleazar Barroso in August

Housekeeper Delia Ramirez recalled that environmental services supervisor Eleazar Barroso gave all employees a leaflet from Respondent stating that the Union was trying to organize employees at the Hospital. Barroso told Ramirez that she did not want her employees involved. Ramirez believed that this conversation occurred in July although she was not certain about the date. She thought that on the day of this or a subsequent conversation, the nurses were walking a picket line.[6]

Barroso denied having any conversation with Ramirez about the Union and denied giving her a document regarding the Union. According to RN Laurel Cheney, a member of the California Nurses' Association negotiation committee, the only time she was aware that the nurses engaged in informational picketing during 1999 was in November, close to Thanksgiving. In fact, a notice of intent to picket targeted this incident as occurring on November 23. Cheney as well as Director of Human Resources Martinez were unaware of any other occasions when nurses passed out leaflets. Cheney recalled that negotiations began in August and were ongoing at the time of the hearing. Informational bulletins were prepared by the nurses throughout bargaining to keep everyone informed about what was going on in negotiations.

Counsel for the General Counsel argues that although Ramirez could not recall the precise date of the conversation, her testimony should be credited over the testimony of Barroso, who, incredibly, denied any conversations whatsoever with Ramirez and, additionally, denied seeing any leaflets from Respondent regarding the union organizing campaign. Counsel contends that Barroso's admonition not to get involved in union activity unlawfully interfered with, restrained, and coerced union activity, relying on *Sundance Construction Management,* 325 NLRB 1013, 1014 (1998) (supervisor's remark that he was disappointed in employee and thought employee knew better, constitutes threat of reprisal); *Farm Fresh, Inc.,* 305 NLRB 887, 890 (1991) (asking employee what he was doing with union rep conveyed employer's disapproval); and *Gilston Electric Contracting Corp.,* 304 NLRB 124, 130 (1991) (admonition to exercise conscience with expression of unhappiness toward any employee who might vote in election, coercive).

Counsel for Respondent argues that even if Ramirez is credited, any such one-on-one conversation was de minimis, relying on *Clark Equipment Co.,* 278 NLRB 498, 505 (1987). Additionally, counsel asserts that it was permissible for Barroso to offer her opinion that she did not want employees under her supervision to unionize, relying on *NLRB v. Tennessee Coach,* 191 F.2d 546, 554 (6th Cir. 1951); *NLRB v. Sparks-Withington Co.,* 119 F.2d 78, 82 (6th Cir. 1941); *American Bottling Co.,* 99 NLRB 345, 364 (1952), enfd. 205 F.2d 421 (5th Cir. 1953), cert. denied 346 U.S. 921 (1954).

I credit Ramirez' testimony and find that Barroso's admonition to Ramirez not to get involved in union activity was violative of Section 8(a)(1) as it tended to interfere with, restrain, and coerce union activity. Although Barroso certainly might have permissibly told employees that she did not favor unionization, her words went further and implied repercussions if employees disobeyed. It is probable that Ramirez did not see the nurses picketing at the time of this conversation with Barroso. However, it is likely that she associated it with distribution of information by nurses regarding the status of their negotiations, which began in August. However, it is impossible to determine, based upon this method of dating, whether the conversation occurred before or after August 13, the date the petition was filed. Accordingly, this violation will not be considered in determining whether the election should be set aside.

C. Alleged Interrogation, Threat of Job Loss, and Statement Regarding Permanent Replacement of Strikers by Margaret Johnson on or about August 5

On August 5, surgical technicians Carla Mullanix-Ackerman and Laura Williams spoke with their supervisor RN Margaret Johnson, team care coordinator, at the central sterile desk. According to Ackerman, Johnson had just returned from a meeting and showed them a document which set forth reasons why Respondent did not want a Union at the Hospital. Johnson asked if either of the employees had belonged to a Union previously. Williams said she had not and Ackerman told Johnson that she had. Johnson said she was in an awkward position because she belonged to California Nurses Association. She asked why they wanted a Union. Ackerman, who was an open union advocate, responded that employees wanted to be represented probably for the same reason that Johnson belonged to California Nurses Association. Johnson

[6] In a subsequent conversation, Ramirez testified that Barroso told her that either way there were a lot of people who wanted to work. The General Counsel does not seek any finding regarding the legality of this statement.

countered that SEIU was different. She noted that California Nurses Association was educated while with SEIU, technicians would be grouped with environmental services and kitchen help. Johnson added that if a Union came in, jobs might be lost due to cutbacks and if employees went on strike, they would be permanently replaced.

Johnson agreed that she spoke to Ackerman and Williams at the central sterile desk. She agreed that she had just returned from a meeting and had a document with her but she could not recall what the document was. She agreed that she asked if either of them had belonged to a Union in the past. Williams said no and Ackerman said yes. Johnson asked if they felt they were getting enough information to satisfy themselves before they cast their vote and they both said they were. There was no further conversation as far as Johnson could remember. Johnson did not recall asking them why they would want to have a union and she did not believe that is something she would have asked because she did not care whether the employees were represented or not. On cross-examination, Johnson thought it was possible that Ackerman might have mentioned that Johnson was a Union member but Johnson really could not remember the conversation other than what she testified to on direct.

Counsel for the General Counsel asserts that asking Ackerman and Williams whether they had ever belonged to a Union and why they would want a Union in the Hospital reasonably tended to restrain and coerce them. Counsel contends that by telling the employees that jobs might be lost for cutback reasons if a Union came in, Johnson threatened job loss, citing *Reeves Bros.,* 320 NLRB 1082 (1996), and *Triec, Inc.,* 300 NLRB 743 (1990), enfd. 946 F.2d 895 (6th Cir. 1991). Finally, counsel argues that by telling the employees that they would be permanently replaced if they went on strike, Johnson further unlawfully threatened employees.

Counsel for Respondent urges that Ackerman's testimony should be disregarded because of bias. Counsel further notes that Ackerman agreed that this conversation took place prior to the filling of the petition for representation.

I credit Ackerman's testimony. In my view she was a straight forward, credible witness who did not exaggerate. "An employer is free to communicate . . . his general views about unionization . . . so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969). It is well settled that an employer may permanently replace strikers. *Laidlaw Corp.,* 171 NLRB 1366, enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). "An employer may address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw,* so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with . . . *Laidlaw*." *Eagle Comtronics, Inc.,* 263 NLRB 515, 516 (1982). The assertion that employees would be permanently replaced if they went on strike, goes beyond the boundaries of Section 8(c). Cf. *Quirk Tire,* 330 NLRB 917, 925 (2000) (no violation where employer stated that employees could be permanently replaced in the event of a strike). Similarly, by telling employees that jobs might be lost due to unionization, Johnson went beyond objective facts. In this context, Johnson's questions are also violative. Accordingly, I find that Johnson's interrogation, threat, and statement regarding permanent replacement reasonably tended to restrain and coerce employees.

D. Alleged Interrogation by Denise Miller During September

Following several meetings in which Respondent presented its position regarding unionization of employees, emergency room supervisor Denise Miller met with Carla Mullanix-Ackerman to see if Ackerman had any questions about the presentations. According to Ackerman, Miller asked Ackerman whether she felt that the presentation was informative and whether she felt that employees were becoming confused. Miller also asked Ackerman if her opinion of the Union had swayed and whether other employees' opinions had changed. Miller agreed that she asked Ackerman if she found the meetings informative. However, Miller denied asking Ackerman whether the meeting had swayed her or others' votes.

Counsel for the General Counsel contends that this questioning reasonably tended to restrain and coerce Ackerman. Counsel notes especially that asking about other employees' Union sympathies militates in favor of finding a violation even where the employee being questioned is an open and active Union supporter, citing *Cumberland Farms,* 307 NLRB 1479 (1992).

Counsel for Respondent urges that Ackerman should not be credited and also argues that Miller's alleged statements do not constitute unlawful interrogation under all the circumstances. Counsel notes that none of the election objections allege interrogation as a basis for setting aside the election. Finally, counsel argues that even if found to be technically violative, the exchanges should be regarded as de minimis.

I credit Ackerman's version of the conversations. I find, in agreement with the General Counsel's argument, that even though Ackerman was an open and active union adherent, seeking to elicit evidence regarding the union sympathies of other employees militates in favor of finding a violation.

E. Alleged Interrogation and Threat of Job Loss by Virginia Rojas in September

In September, Natividad Felix, unit secretary in med/surg, testified that she and certified nursing assistant (CNA) Julie Garcia, Henrietta Perez, licensed vocational nurse (LVN) Helen Felano, LVN Nancy Velasquez, CNA Leonore Ramos, ward clerk Estella Garcia, and CNA Yolanda Castro were eating food from a company sponsored barbecue which was in a nearby park. Felix and the others could not find a place to sit in the park so they carried their food back to the Hospital and ate in the activity room (room 18). According to Felix and Garcia, Rojas came in and looked mad. She yelled, "you are all liars." Someone asked why she was calling them liars. Rojas responded that the employees did not tell her anything about the Union. Felix could not recall anything further. Garcia recalled that Rojas continued that the employees were stabbing her in the back and explained that all unions do is take employees' money. Rojas warned that if employees went on

strike, there was a list of people that were ready to take their jobs. She told employees they should have come to her.

Henrietta Perez recalled the same incident. Rojas came into the room with her lunch and said, "you guys are all a bunch of liars." Perez asked what Rojas meant. Rojas said, "you guys are all a bunch of liars because you said that you guys were not involved in the union, and you all signed petitions." Rojas warned employees that if they went on strike, they could all lose their jobs. Perez retorted, "who said anything about a strike? We haven't even got a union yet."

Rojas denied that she had ever called anyone a liar. "I've never called anybody a liar in my life." Similarly, Rojas denied telling employees that they were stabbing her in the back. Rojas recalled telling employees that in case of a strike, the hospital would have to continue operating and would bring in replacement workers. However, Rojas denied telling employees that they would be easy to replace. Rojas recalled that in response to a question about what the hospital would do if the nurses went on strike, she told employees that there were agencies that would provide replacement staff. Rojas did not recall if that question was asked on this particular occasion or at some other time.

Counsel for the General Counsel argues that by calling the employees liars, Rojas interrogated employees by soliciting denials and, additionally, created the impression of surveillance by informing employees that Respondent was aware of who signed the petition. Counsel relies on *Oster Specialty Products,* 315 NLRB 67 (1994); *Athens Disposal Co.*, 315 NLRB 87 (1994). Counsel also argues that by using an angry tone of voice, employees would reasonably infer that Rojas was threatening retaliation, citing *HarperCollins Publishers, Inc.,* 317 NLRB 168, 180 (1995), enfd. in relevant part 79 F.3d 1324 (2d Cir. 1996). Finally, counsel asserts that Rojas threatened employees with job loss by telling employees that the Hospital already had a list of employees who could easily replace them. Counsel cites *Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969); *Mediplex of Danbury,* 314 NLRB 470, 471 (1994).

Respondent argues that Rojas testimony should be credited over that of the employees. Respondent also notes that there are no objections regarding interrogation. Finally, Respondent asserts that any interrogation is de minimis. As to the alleged threat, Respondent argues that statements regarding the possibility of strikes are permissible because no statement depicted inevitability of strikes. Counsel cites *Jasta Mfg. Co.,* 246 NLRB 48, 64 (1979), enfd. 634 F.2d 623 (4th Cir. 1980); *First Data Resources,* 241 NLRB 713, 725 (1979); *Pirelli Cable Corp. v. NLRB,* 141 F.3d 503, 516, 517 (4th Cir. 1998); *Morristown Foam & Fibre Corp.,* 211 NLRB 52 (1974).

I credit Felix, Garcia, and Perez and find that Rojas implicitly interrogated employees about their union activities and threatened them with job loss by telling them they would be replaced if they went on strike and there was a list of employees who could easily replace them.

F. Alleged Offer of Financial and Other Benefits by Virginia Rojas on or about September 30

Julie Garcia spoke by telephone with Rojas regarding a scheduling concern. Rojas volunteered that she had just signed a financial aid document for Nancy Velasquez in order that she could continue her RN training with Respondent's assistance. Rojas told Garcia that Respondent could do that for her as well. Garcia, who had asked for assistance in the past without success, refused the offer because she only had one more semester to complete.

Rojas recalled talking with Garcia frequently about trying to get financial assistance for her education. Rojas recalled telling Garcia that Velasquez had applied for financial assistance and Garcia should put in her application. In late September Velasquez asked Rojas what had happened with her financial assistance and Rojas said she would look into it. When Rojas checked with Raye Burkhardt, director of nursing, she was informed that the request was still pending. Rojas wrote a letter of recommendation for the financial aid for Velasquez and offered to do the same for Garcia. However, she did not at any time tell Garcia that she could get financial assistance for her.

Counsel for the General Counsel and for Respondent agree that any offer of financial aid was never verbally linked by Rojas to the union campaign. Counsel for the General Counsel asserts, nevertheless, that the timing of the offer of financial assistance, coming a week before the hotly contested union election, supports a finding that it was offered to dissuade Garcia from supporting the Union. Counsel relies upon *Comcast Cablevision,* 313 NLRB 220 (1993); *Yale New Haven Hospital,* 309 NLRB 363 (1992); *Max Factor & Co.,* 239 NLRB 804 (1978), enfd. 640 F.2d 197 (9th Cir. 1980), cert. denied 451 U.S. 980 (1981). Respondent argues that nothing ties anything Rojas said to the union campaign and, admittedly, Rojas and Garcia had discussed financial aid over a period of time preceding the union campaign. Counsel also argues that Garcia's testimony should be discredited and that any violation is de minimis.

Although nothing explicit was said about the Union during this conversation, the fact that Garcia had requested assistance before the advent of the Union and was only offered assistance (or even a letter of recommendation to further the request for assistance) shortly before the election, supports an inference that the offer was motivated by the union activity of employees. Accordingly, I find that Respondent violated the Act by offering financial aid in order to dissuade an employee from supporting the Union.

G. Alleged Ban on Wearing Union Buttons, Statement of Futility in Selecting the Union, and Solicitation of Grievances by Virginia Rojas on or about October 1

Staff nurse Eva Reyes attended the meeting. Rojas began the meeting by telling the LVNs and CNAs to remove the union insignia: a "weeble" with a ribbon stating, "Working Together Works. SEIU Local 250. Yes." Bernice Castro, of Health Information Management, came to the door and conferred with Rojas. Rojas returned and told employee they could wear the weeble but they had to remove the union ribbon. According to Reyes, Rojas clenched her hands and spoke sternly saying that

she could not believe the employees were "doing this." Rojas asked why employees did not come to her first and asked what they thought the Union could offer them. Reyes interjected asking Rojas whether this was a staff meeting or an antiunion meeting. Rojas ignored Reyes' question and continued telling employees that unions just wanted money. Reyes said that was enough. Allison Padgett, RN in the recovery room, conducted an in-service at that point.

Medical/Surgical unit secretary Natividad Felix arrived at the meeting after it had begun. She recalled that Rojas told employees that they could not wear the union insignia: a "weeble" with a ribbon stating, "Working Together Works. SEIU Local 250. Yes." Several employees, who were wearing the weeble, tore the ribbon from the weeble. Felix left the meeting at that point.

Respondent's policy requires that jewelry, if worn, "be minimal and in good taste and should not interfere with direct patient care or other on-duty responsibilities. Profession-related pins may be worn."

Rojas recalled that on numerous occasions she told employees that they needed to understand that they would have to pay union dues without a guarantee of getting anything in return. Rojas also recalled that every time she sent employees to the informational meetings about the Union, they protested that they did not want to go and did not care anything about the Union. Then she saw them wearing the weebles with union insignia, "and I don't mind telling you that I—it took my breath away. I was—I still get upset every time I think about it." "When I walked in, and I saw them, I said, what is this about? I said, I thought we had no problems? I, yeah, guys, I feel like you guys hit me in the stomach. I really—that was—that was a bad day. That was a very bad day." Rojas stated that she took the Union effort personally because she felt ineffective as a manager and wished employees had come to her with issues and problems. She recalled saying, "You know, guys, we can't solve department problems if I don't know about them. I—I feel like I'm useless. I feel like I'm just so ineffective as a manager that I can't help resolve problems that we—that, apparently are out there."

As to wearing the weebles, Rojas recalled that Bernice Castro initially told her that employees had to remove the weebles but Castro came back and told Rojas that employees could wear the weeble but could not wear the union logo on the weeble. Rojas denied telling employees that the Union could not provide job security.

Counsel for the General Counsel alleges that by telling employees that she felt as if they hit her in the stomach, Rojas unlawfully interrogated employees because her comment was an invitation to explain what led them to support the Union. Counsel also asserts that by requiring employees to remove the union logo from the weebles, Respondent unlawfully restricted union activity, relying on *Inland Counties Legal Services,* 317 NLRB 941, 941–942 (1995) (employer may limit or ban union insignia by showing special circumstances); *Escanaba Paper Co.,* 314 NLRB 732 (1994), enfd. 73 F.3d 174 (6th Cir. 1996) (mere possibility of customer offense does not outweigh employee right to wear union insignia); and *St. Luke's Hospital,* 314 NLRB 434, 434–435 (1994) (special circumstances did not exist based upon possibility of patients being upset). Finally, counsel argues that when viewed in this context, Rojas' statement regarding unions—all they do is take your money—is an unlawful statement of futility.

Counsel for Respondent contends that even if Rojas told employees that she wished they had come to her first with their problems, such statement was a lawful opinion and merely indicated that Rojas felt ineffective as a manager. Counsel asserts that requiring that the Union logo be removed was lawful pursuant to the Hospital's policy prohibiting articles of clothing with advertising logos. Counsel relies on *London Memorial Hospital,* 238 NLRB 704, 708 (1978) (prohibition on wearing union insignia in patient care areas is presumptively valid); *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 506 (1978) (noting that the Board does not prohibit rules forbidding organizing activity in patient care areas).

Rojas' statements of disappointment to employees was coercive and particularly required employees to keep Rojas informed of union activity in the future. As noted by counsel for the General Counsel, statements which equate support for the Union with disloyalty are unlawful. See, e.g., *Sea Breeze Health Care Center, Inc.,* 331 NLRB 1131, 1132 (2000). Moreover, Rojas statement that all unions do is take employees money reasonably tended to interfere with protected activity as it asserted the futility of unionization.

Respondent's ban on wearing of union insignia was not limited to patient care areas and thus fails to fall within the rule allowing such a ban in patient-care areas. In the absence of special circumstances, such as maintenance of production, discipline, safety or alienation of customers, employees have a protected right to wear Union buttons at work. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801–803 (1945). As no special circumstances have been shown to exist in non-patient-care areas, the requirement that union insignia be removed was unlawfully broad and tended to restrain and coerce employees.

H. Alleged Solicitation of Grievances by Walter Beck on or about October 1

Following the in-service, CEO Walter Beck and DON Raye Burkhardt entered the meeting. LVN Tricia Tipton told Burkhardt that she had worked for Respondent for 3 years and only seen the DON on one occasion. Felix and Ramos told Burkhardt that they felt they were unimportant to management. RN Eva Reyes stated that management said nurses were spoiled, underworked, and overpaid. Beck asked who said that and Rojas responded that she had stated that nurses were spoiled.

According to Reyes, Beck told employees that he and Burkhardt were there to answer questions or concerns. He invited the employees to open up and talk to him stating that if there were problems they could solve, the employees should speak to him. Reyes told Beck it was very difficult for employees to speak to him because he was intimidating. Beck said that was probably because he was so tall. Reyes stated that her perception was that he walked around the hospital and found things that were wrong and never complimented employees on things they did correctly. Beck asked where Reyes' anger was coming from. She responded that she was

frustrated. According to Reyes, Beck asked if this was due to the California Nurses' Association negotiations and Reyes responded negatively. Beck denied asking this.

Beck recalled telling employees that he was there to ensure that they had the appropriate information to make the right decision but he was not there to resolve any of their issues. He told employees he could not make any promises. According to Burkhardt, Beck at no time asked employees what their problems were. He only asked employees what their questions were—whether they had any questions. Rojas could not remember exactly what Beck told employees. However, she testified that she did not remember him saying that he would solve employee's problems if they told him what their problems were. Rojas also recalled that she did admit to Beck that all employees at the hospital were spoiled. Rojas recalled that Beck said something about having an open door if there were any more questions.

Counsel for the General Counsel contends that by telling employees to open up and communicate with him about any problems, Beck solicited employee grievances and impliedly promised to remedy them. Counsel cites *Hertz Corp.,* 316 NLRB 672, 686–687 (1995)*; House of Raeford Farms,* 308 NLRB 568, 569 (1992). Moreover, counsel asserts that even if Beck told employees that he could not make any promises, such a disclaimer, in the context of no past practice of soliciting complaints, is ineffective, citing *Heartland of Lansing,* supra*,* 307 NLRB at 156.

Counsel for Respondent asserts that Beck simply offered to answer questions and that this does not constitute an improper solicitation of grievances. Counsel relies upon *Shen Lincoln-Mercury Mitsubishi, Inc.,* 321 NLRB 586, 590 (1996*); Viacom Cablevision*, 267 NLRB 1141 (1983)*; Brown & Root U.S.A., Inc.,* 308 NLRB 1206, 1212 (1992).

Beck's presence at the employees meeting was in direct response to the union campaign. There was no precedent for his addressing employees—whether to ask if they had any questions or to ask that they open up and talk to him about problems that might be solved. I find that by extending an open door policy at the height of the union campaign, where no such policy existed previously, Respondent solicited grievances and impliedly promised to remedy them.

I. Alleged Threat of Job Loss, Reduction of Wages and Loss of Benefits by Virginia Rojas on or about October 1

Medical/Surgical unit secretary Natividad Felix and CNA Leonore Ramos were eating lunch in an office around 1 p.m. when Rojas entered and began speaking to them. Rojas said, according to Felix, that if employees unionized and went on strike, the Hospital could easily find replacements for positions such as CNAs, dietary aides, and housekeeping. Felix responded that the Union offered better wages and benefits. Rojas responded that actually benefits could go down. Rojas denied saying anything remotely like this. Rojas recalled both Felix and Ramos denigrating their status on various occasions, stating that they were nothing—just CNAs. Rojas recalled telling employees that the hospital had to stay open even if there was a strike and it would have to hire replacements. However, she never told employees that their jobs were at stake and she did not tell employees they could be easily replaced. Rojas denied telling employees that benefits could go down. She recalled telling employees that there were no guarantees and that benefits could stay the same or go up or down.

Counsel for the General Counsel notes that pursuant to *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618–619 (1969), an employer is free to communicate general views about unionism so long as there is no threat of reprisal or force or promise of benefit. Counsel also notes that if there is any indication that an employer may take action solely on its own initiative for reasons unrelated to economic necessity, that the communication losses its free speech protection. Counsel asserts that Rojas went beyond allowable speech by asserting that Respondent would take action unrelated to economic necessity.

Counsel for Respondent contends that Rojas' statement regarding strikes was lawful and constituted an opinion regarding what could happen if employees went on strike. Respondent also notes that Rojas is alleged only to have said that wages could go down—not that they would go down. Accordingly, Respondent asserts that no violations should be found, relying on *Atlantic Forest Products, Inc.,* 282 NLRB 855 (1987). Respondent also asserts that any violation should be found de minimis.

I credit Felix and find that Rojas told employees they could easily be replaced if they went on strike. I also find that Rojas told employees that wages and benefits could decrease. In the context, both comments are violative.

J. Alleged Interrogation and Threat of Job Loss by Virginia Rojas, October 6

While Medical/Surgical unit secretary Natividad Felix was at the nurse's station, Rojas approached her with a union flyer with Felix' picture in it. Felix was listed as a member of the union organizing committee in a union flyer dated August 26. Felix' statement in the flyer reads, "I'm supporting the union for better working conditions and quality of care. With a union, we'll be able to negotiate our benefits package based on our needs." In an angry tone of voice, Rojas asked what Felix meant by this. Felix responded that employees needed the Union to get good benefits and maybe good wages. Rojas recalled speaking to Felix about the flyer and asking Felix if she really felt that the hospital provided poor nursing care. Rojas recalled that she had circled the statement by Felix in the flyer.

Activities Director Henrietta Perez spoke to Rojas in her office. Rojas showed Perez a union flyer which had a statement by Perez in it as well as a picture of Felix and a picture of Leonore Ramos. These three items were circled. Rojas asked Perez to explain her statement. Perez said it was fairly self-explanatory—she wanted a Union for job security and to be treated with respect. Rojas opened a file drawer full of files and said,

> you see these, these are all applications of people who want to —who want to come and work here, and will replace you. . . . these are all people that if you go on strike, they will come in and replace you. The hospital has only to make one phone call to this agency—the hospital has an agency. The hospital only

has to make one phone call, and people will be here to replace all of you.

Finally, Rojas added, according to Perez, that she had been told to get rid of Perez but Rojas would not do that because Perez was a hard worker. On her way out of the office, Perez saw RN Laurie Grasso who asked Perez what was wrong. Perez repeated the file cabinet information to Grasso. Grasso corroborates Perez' testimony in this regard.

Rojas recalled meeting with Perez in her office and discussing some personal matters as well as the Union. She had a union flyer on her desk and Perez was quoted in the flyer: "I want to form a union so staff has a voice for better patient care, for job security, and so there is fairness for all employees." Rojas asked Perez, "am I not fair with you, or where is that coming from?" Rojas also recalled that she had a stack of applications on her desk during the conversation and Perez referred to them and asked if the hospital was, "hiring people to come in." Rojas said there's a little bit of everything here. There's RNs, nurses' aides, medical assistants and a couple of activities people here. "But it was not in a threatening way." Rojas denied referring to the applications and saying that if there were a strike, the hospital could replace everyone.

Counsel for the General Counsel contends that Rojas' asking Perez what she meant by a quote in a Union leaflet and asking to have the comment explained, in the circumstances here where Rojas was visibly upset and speaking in a loud, angry tone of voice, constitutes interrogations. Counsel relies on *HarperCollins,* supra*,* 317 NLRB at 180. Further, counsel asserts that by telling Perez that if employees went on strike the Hospital needed to make only one phone call and people would be replaced, Rojas threatened Perez.

Counsel for Respondent contends that Rojas questioning does not constitute unlawful interrogation. Rather, Rojas was trying to understand why the employees believed the Hospital provided poor patient care. Moreover, counsel notes that interrogation is not alleged as objectionable conduct and further contends that the incident should be viewed as de minimis. As to the alleged threat, counsel asserts that Rojas' version of the conversation should be credited.

I find that Rojas' questioning in the totality of circumstances herein would reasonably tend to restrain and coerce employees. Moreover, I credit Perez and find that Rojas threatened her.

K. Alleged Ban on Talking About the Union During "Work Hours" and Telling Employees They Did Not Need a Union and that Employees Were Stabbing Her in the Back by Seeking a Union by Virginia Rojas, on Numerous Occasions Between July and October

CNA Julie Garcia testified that on numerous occasions, Rojas told employees they were not allowed to talk about the Union at work, whether it was on break or not. She told employees that they should not try to ask anybody to sign up for the Union. She repeatedly told employees that the Union was only out for money—not to help employees. Rojas also told employees they stabbed her in the back by signing up for the Union. Rojas repeatedly told employees that there were others waiting to take their jobs.

RN Laurie Grasso also recalled that Rojas spoke to employees on a daily basis asking why employees needed a union and stating that all the union would do was take their money. Rojas stated that everyone was replaceable. Rojas told employees she felt stabbed in the back and she was getting things turned around for employees so they did not need a union.

RN Eva Reyes recalled frequent occasions around the nurses' station when Rojas made comments about being stabbed in the back and asking why no one came to talk with her. Rojas also told employees that Respondent was ready for them and employees could be easily replaced. Reyes also recalled Rojas telling employees that they were not allowed to talk about the Union or pass out any information on Hospital property.

Activities Director Henrietta Perez recalled that every time two or three people were talking, Rojas would remind employees that they were not allowed to talk about the Union during working hours.

Rojas denied ever telling Grasso or anyone that she felt like she had been stabbed in the back by employees. Rojas denied telling employees that they could not talk about the Union at work whether they were on break or not. Rojas recalled telling employees that they could not conduct union business in patient care areas. Rojas denied that she told employees that there is somebody there to take your job. Rojas never said that the Union will only take money. She told employees there were no guarantees.

Counsel for the General Counsel contends that by telling employees on numerous occasions that the Union was not there to help them, by telling employees on numerous occasions that she felt betrayed and stabbed in the back, by telling employees they should have come to her first and by telling employees on numerous occasions that they were replaceable, Respondent violated the Act. Moreover, by telling employees that they could not talk about the Union during working hours, counsel contends that Respondent promulgated and enforced an unlawfully overbroad no-solicitation/no-distribution rule. Counsel relies on *Ichikoh Mfg.,* 312 NLRB 1022 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994); *Keco Industries,* 306 NLRB 15 (1992); *Our Way, Inc.,* 268 NLRB 394 (1983); and *St. John's Hospital,* 222 NLRB 1150 (1976), enfd in relevant part 557 F.2d 1368 (10th Cir. 1977).

Counsel for Respondent asserts that Rojas' statements were lawful noting that a health care facility may ban employee's solicitation and distribution in immediate patient care areas. Further, counsel asserts that Rojas' statement regarding "being kicked in the stomach," was nothing more than a brief emotional reaction to being surprised about the support for the Union.

I credit the testimony of the employees and find that on numerous occasions, Rojas banned talking about the Union on working hours, told employees they did not need a Union, and told employees they were stabbing her in the back by unionizing. These statements were in violation of the Act as they reasonably tended to restrain and coerce the listeners.

L. Alleged Statement that Employees Were a "bunch of traitors and back stabbers" and Statement that Employees Should not

Talk to Her by Virginia Rojas on October 7 After the ballot Count

RN Laurie Grasso was at the nurse's station shortly after the votes were counted. Rojas came down the hall toward the nurse's station. Nancy Valasquez approached Rojas to ask a question and Rojas threw up her hands and said she did not want to see or talk to any of the CNAs or LVNs. They did not know what they were getting into. Rojas said she did not want to see Felix or Perez.

Activities Director Henrietta Perez recalled the same episode. According to Perez, Rojas was yelling that the employees were a bunch of back-stabbers and liars and she did not want to see any of them. She said she did not want to see Leonore's face, she did not want to see Nattie's face. She did not want to see Graciela Sanchez' face.

Rojas recalled after the election, "it had been horrendous, the stress level in the department had been tremendous. . . . I was exhausted." She told employees that now that the count was over, she did not want to hear another word about the Union for the rest of the day. She did not recall mentioning anyone's name. She did not say she did not want to see anyone's face.

Counsel for the General Counsel asserts that Rojas' statements and angry demeanor clearly conveyed to employees her displeasure that enough employees had voted for the Union to cause a tied vote. Implicit in Rojas' words, according to counsel, is a message that employees' union activities will be viewed as disloyalty to Respondent and may lead to negative repercussions from Rojas.

Counsel for the Respondent notes that Rojas, admittedly an emotional individual, was exhausted after the vote count. Rojas stated that she simply told employees she wanted to hear nothing more about the Union that day. Moreover, counsel notes that even if Rojas is not credited, the alleged statement occurred after the vote count and cannot be a basis for setting aside the election.

I credit the testimony of the employees and find that Rojas' statements tended to restrain and coerce employees as a thinly veiled threat and admonition that support for the Union was an act of disloyalty.

M. Alleged Unlawful No-Solicitation, No-distribution rule

At all relevant times, Respondent has maintained and enforced in its Policy and Procedure Manual, the following solicitation policy:

> Under no circumstances will Hospital employees and non-employees be permitted to solicit or distribute written materials for any purpose on the Hospital premises.

Counsel for the General Counsel attacks this rule for two reasons. First, he argues that the rule is overbroad in prohibiting employee rights to solicit in nonpatient care areas. Second, he argues that it is overbroad in prohibiting nonemployees from soliciting in nonwork areas outside the Hospital. Relying on *St. John's Hospital,* supra*,* 222 NLRB 1150 (1976), counsel for the General Counsel argues that Respondent's rule is overbroad because the rule prohibits all solicitation and distribution in areas other than immediate patient care areas. Counsel notes that the rule makes no attempt to distinguish between direct patient care areas and other areas on the Hospital premises. Counsel also argues that the ban violates the Act by impermissibly barring nonemployees from soliciting and distributing in nonwork areas outside the Hospital. Counsel asserts that Respondent has only a weak property interest and falls outside the "modest retail establishment" exception in *Robbins v. Pruneyard,* 153 Cal Rptr. 854, 592 P.2d 341, affd. 447 U.S. 74 (1980). Thus, counsel argues, nonemployee union agents have a right to access nonwork areas outside the hospital, subject only to reasonable time, place, and manner restrictions. Finally, counsel notes that by restricting the rights of nonemployee solicitors, Respondent's no-solicitation rules violate the Moscone Act[7] and thus constitutes a violation of Section 8(a)(1) on this basis as well.

Respondent contends that the no-solicitation, no-distribution rule set forth in the policy manual was never distributed or enforced and thus cannot constitute a violation. However, I note that Respondent admitted in its answer to the complaint that the rule has been maintained and enforced at all material times.

Turning then to the merits of the issue, Respondent's rule is clearly overbroad with regard to employee rights to distribute and solicit for the Union in nonpatient-care areas. Moreover, I have previously found that Rojas warned employees, consistent with the rule, that they could not solicit or distribute at any time on the Hospital premises. Additionally, with regard to non-employee solicitors, I find that the rule is overbroad as well. The rule makes no attempt to set forth time, place, or manner restrictions on non-employee solicitation. Rather, it simply bans all such solicitation. In making this determination, I am guided, by analogy, to the analysis applied to large retail establishments.[8] As Associate Chief Administrative Law Judge William L. Schmidt stated recently in *Winco Foods, Inc.,* JD(SF)–62–00, slip opinion at 5–6 (Sept. 25, 2000):

Ordinarily an employer may bar nonemployee union agents from distributing literature on its property except in the rare cases—not applicable here—involving inaccessible employees. *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992); *NLRB v. Babock & Wilcox Co.,* 351 U.S. 105 (1956). While *Lechmere* requires "appropriate respect" for an employer's property rights, the Board does not accord an employer "any greater property interest than it actually possesses." *Bristol Farms,* 311 NLRB 437, 438 (1993). Hence, in nonemployee access cases, the property owner seeking to bar nonemployee union agents engaged in Section 7 activity has the "threshold burden" of establishing that "it had, at the time it expelled the union representatives, an interest which *entitled* it to exclude individuals from the property." *Indio Grocery,* 323 NLRB 1138, 1141 (1997), enfd. *NLRB v. Calkins,* 187 F.3d 1080 (9th Cir. 1999).

In California, an employer enjoys no right to exclude nonemployee union representatives engaged in peaceful

[7] Cal. Code of Civ. Proc. Sec. 527.3.

[8] As noted by counsel for the General Counsel, the Hospital is a relatively large establishment, open to the general public, serving southern Monterey County. It is visited by a large volume of patients and their friends and relatives. It has a public cafeteria and its lobbies provide general areas for congregation. There is no evidence that the property is posted against trespass.

picketing or handbilling from the premises surrounding a retail establishment. After reviewing the lengthy evolution of this subject in the California courts and in its legislature, the California Supreme Court summarized its definitive holding on this subject in *Sears, Roebuck & Co. v. San Diego District Council of Carpenters,* 25 Cal. 3d 317 (1979), in the following manner:

> [T]he sidewalk outside a retail store has become the traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store. Recognized as lawful to decisions of this court, such picketing likewise finds statutory sanction in the Moscone Act, and enjoys protection from injunction by the terms of the act. In such context, *the location of the store whether it is on the main street of the downtown section of the metropolitan area, in a suburban shopping center or in a parking lot, does not make any difference.* Peaceful picketing outside the store, involving neither fraud, violence, breach of the peace, nor interference with access or egress, is not subject to the injunction jurisdiction of the courts. [Emphasis added.]

Accordingly, I conclude that Respondent's rule violates Section 8(a)(1) for two reasons. First, as to employee solicitation and distribution, it fails to distinguish between direct patient care areas, where solicitation and distribution may lawfully be banned. Second, with regard to nonemployee activities, the complete ban on all activities on Hospital premises is not supported by a sufficient property interest.

N. Alleged Unlawful Ban from Premises Rule

The parties agree that at all relevant times, Respondent maintained the following policy:

> No Hospital employee shall enter or remain on Hospital premises for any purpose except to report for, be present during and conclude his/her shift.
>
> Without Hospital authorization, employees should not report to work more than ten (10) minutes before their shift begins and should not remain on the premises more than ten (10) minutes after their shift ends.

Counsel for the General Counsel notes that the same rule was found unlawful in *Lafayette Park Hotel,* 326 NLRB 824, 828–829 (1998). Moreover, counsel avers that even if the rule were ambiguous, any ambiguity should be construed against the promulgator. Finally, counsel notes that Respondent has not proffered a business justification for the rule.

Counsel for Respondent contends that there is no evidence that the loitering policy was enforced in an unlawful manner and thus the allegation is without merit. I note, however, that Respondent admitted in its answer to the complaint that the rule has been maintained and enforced at all relevant times.

I find, in agreement with counsel for the General Counsel, that the rule is unlawful. In *Tri-County Medical Center,* 222 NLRB 1089 (1976), the Board held,

> [S]uch a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

The rule at issue in *Lafayette Park Hotel,* relied upon by counsel for the General Counsel, provided, inter alia, "Employees are required to leave the premises immediately after the completion of their shift and are not to return until the next scheduled shift." The Board held that the rule did not contain explicit exclusion of parking and other outside areas and, therefore, employees would reasonably understand the rule to include these areas. Respondent's rule is identical and, accordingly, I find it violates Section 8(a)(1).

O. Alleged Verbal Harassment Followed by Constructive Discharge or Refusal to Rehire or Refusal to Allow Rescission of Voluntary Resignation of Carla Mullanix-Ackerman Because of Her Union Activity

Carla Mullanix-Ackerman worked as a surgical technician and secretary in the surgery department. As a technician, she worked in sterile conditions passing instruments to the surgeon. After the surgery was completed, she cleaned the room and prepared it for environmental services to finish cleaning. Finally, she "flashed" the instruments and took them to central sterilization to complete the process. Ackerman was supervised by Shirley Hovis, certified registered nurse anesthetist until 1998. RN Margaret Johnson, team care coordinator, became her supervisor at that time.

Surgery hours were from 7 a.m. to 3:30 p.m. Instruments were typically sterilized even if that meant staying after 3:30 p.m. unless duplicates were available. The two surgery technicians rotated on-call status each week, 1 week on, then 1 week off. When called in for emergency surgery, the practice was that the technicians were paid a minimum of 2 hours' pay even if they did not actually work that long. Although the technicians punched a timeclock during their regular shift, on emergency callbacks, they simply wrote in their hours after the fact, on the back of their timecard as well as on the callback log.

In July, Ackerman became a member of the union organizing committee. She signed several union leaflets which were widely distributed throughout the hospital and was listed as a member of the organizing committee in one leaflet. Burkhardt and Johnson were well aware of Ackerman's union activity and support.

On September 25, an unscheduled Caesarian section was set for 3 p.m. RN Laurel Cheney received the call around 2:20 p.m. When she arrived at 2:25 p.m., she was the only person present and she started setting up the surgery. Next to arrive was the nurse anesthetist. Cheney obtained the medication for anesthesia and set up the room, opening packs and performing the work that would normally have been done by the surgery technician. Cheney called to find out if Ackerman had been heard from because she was concerned that perhaps the hospital had been unable to find Ackerman. She was told that Ackerman had responded to the call. At 2:50 p.m., Cheney left to get the patient. When Cheney returned, Ackerman was at the scrub

sink, washing her hands. According to Cheney, this was at 3 p.m.

After the surgery was performed, Cheney and the anesthesia nurse took the patient to the recovery room. When Cheney returned to surgery, Ackerman was dressed and leaving. Cheney was "stunned" and "personally and professionally offended that, you know, she came in as the surgeon would to the case and left. That's not how I was accustomed to working, that's not the routine." Not only was there a delay at the beginning, which Cheney attributed to Ackerman's tardiness, but Ackerman did not stay to clean up. Cheney went back to the surgery and found the placenta sitting on the counter in the biohazardous waste area without formalin having been added. The instruments were not cleaned but Ackerman had put them in the machine to be cleaned. The room was not set up in the event that another Caesarian was required. However, she noticed that Ackerman had replenished the pack and double basin at the central station so that a complete Caesarian cart was available. Additionally, a complete duplicate Caesarian section tray and retractor tray was available.

Cheney, who is a member of the California Nurses' Association negotiation committee at the Hospital, explained that nurses have a contractual clause providing for two-hours minimum callback time. She explained that the 2-hour minimum had been applied to the entire team even though not everyone is covered by the contractual provision. However, Cheney did not feel that it was right for Ackerman to receive the 2-hour minimum under these circumstances, explaining: "There was no communication, you know, as to why she was late and why she was leaving early and why she wasn't doing what she was supposed to do and what would normally happen."

Cheney knew that Ackerman was going to a birthday party at her mother's because Ackerman told her this earlier in the week. However, Ackerman said nothing to Cheney after the Caesarian other than good-bye. According to Cheney, the "crowning blow" was that she noticed that Ackerman had written in 2 hours on the callback log. Cheney felt this was unwarranted because Ackerman, "was not part of the team that I was on at that time, because she wasn't—we weren't working together. She came, she did her thing, split and so I looked at that. My first impulse was to scratch it out in red and write the time in that I knew she came in. . . . " Cheney did not do this, however. Instead, she reported the matter to Johnson, explaining to Johnson that Ackerman was there only one and one-half hours.

Cheney had not worked emergency duty for some time. She was very upset when she called Johnson: "I wanted to know what's going on here? Is this the norm now, I mean, have things changed?" Cheney "ranted and raved a little while" to Johnson and then explained the factual matters to her: "She [Ackerman] waltzed in here like a surgeon and left." Cheney told Johnson that she wanted to change Ackerman's timecard but knew that was not right so she was simply reporting the matter so Johnson could handle it.

Johnson spoke with DON Raye Burkhardt about the matter. Burkhardt told Johnson she could either formally discipline Ackerman or discuss the issue with Ackerman informally and attempt to resolve it. Johnson opted to speak informally with Ackerman about this and various other issues in the department.

On October 4, surgery was concluded in the early afternoon. Ackerman began the flash process for the instruments and then took a lunch break. At about 2 p.m., according to Ackerman, she was called into a meeting by Johnson in a vacant doctor's office in the surgery department. Johnson said that Ackerman could change the whole mood of the department. Ackerman protested that she could not influence others. Johnson said that four of the five nurses do not want to work in surgery anymore because of Ackerman. Ackerman protested that she could not be the cause. Johnson countered that Ackerman was leading Laura Williams, the other surgery technician, and thinking for her. Johnson continued that Ackerman was a "know-it-all" Ackerman protested. Johnson said that Ackerman took too many breaks. Once again Ackerman protested that she did not take any more breaks than anyone else in the department. Johnson added that Ackerman had too many outside interruptions in her work. Ackerman noted that she had not received any outside phone calls for a month. Johnson countered that Ackerman just got them on her beeper during the last month and Ackerman agreed. Johnson said, "that just proves how sneaky you've gotten."

Johnson continued, according to Ackerman, that Ackerman's work was not up to par as far as stocking and instrumentation. Johnson accused Ackerman of having Williams do her work. Ackerman said this was ridiculous. Johnson told Ackerman that she was going to take one-half hour off of Ackerman's callback time. Ackerman testified,

> And I was just stunned at this point. I—I knew—I had heard that she had, and I asked her, I go, but the standard practice is we get two hours. That's what I have always heard, that's what was instructed to me. And at this point in time, she said well, it's a gift from the nursing staff. It was given freely, and it can be taken away. At this point in time, I—I was already standing. I was upset. And I told her, I quit. And she turned—she turned to look at me, and she said, well, if that's how it is. And I left. I walked out of the closed door meeting.

Johnson recalled that she spoke with Ackerman at about 1:30 p.m. Johnson began the discussion by telling Ackerman that she was changing her callback time from September 25 to one and one-half hours because Ackerman had come in late and left early without performing her work. Johnson explained that she had verified with Burkhardt that nonunion ancillary employees were only entitled to 1-hour minimum on callbacks. Johnson also told Ackerman that she needed to change her attitude because, "she acted like she knew everything there was to know about the job." Johnson explained that Ackerman had a lot of influence over the other surgery technician. Johnson told Ackerman that, "the teamwork in our department was going downhill, that [Ackerman's] attitude and actions were irritating some of the other nurses and we weren't working as a team." Johnson also mentioned that the surgery technicians had not been keeping current on stocking the cupboards, which was understandable because they had been extremely busy, but they needed to ask for help in keeping the cupboards stocked. They

next spoke about Ackerman receiving many personal phone calls at work. Ackerman became agitated and began yelling. RN Jill Baker, who was caring for a patient in the recovery room, heard Ackerman's voice through the closed door. Baker reported this to Johnson at a later time and Johnson asked her to write a report.

Ackerman said she would never have a discussion with Johnson again without a witness. Johnson offered to get a witness but Ackerman declined. At this point, Ackerman stood up and said, "you will have my resignation. This is very unfair and you will have my resignation." Johnson protested that she did not want Ackerman's resignation but Ackerman left.

Ackerman changed out of her uniform and came back into the surgery area. RN Laurel Cheney asked Ackerman what was wrong. Ackerman said, "that's it. I quit." Johnson, who was approaching, said it did not have to be that way. Ackerman put down her keys and beeper and left. It was about 2:30 p.m. Her shift ends at 3:30 p.m. Cheney recalled that Ackerman told Johnson something to the effect that, "if you think I'm stubborn, Margaret, you should look in the mirror."

About 15 minutes later, Johnson contacted Burkhardt. Burkhardt said she would talk with Human Resources Director Joyce Martinez and CEO Walt Beck. Later Martinez brought a letter to Johnson for her signature. Johnson signed the letter but did not take any part in drafting it or in making the decision set forth in the letter. The letter provided in part,

> This letter will serve to document our discussion this afternoon and to formally accept your resignation without notice. . . . While I understand that you feel you were treated unfairly, I must reiterate that my intention was to merely provide you with performance feedback. Our conversation did not constitute a disciplinary action; nor did I ever indicate that I was documenting requested performance improvement to file.

Unaware that her resignation had been accepted, Ackerman reported the discussion with Johnson to her husband, who urged her to reconsider. Accordingly, Ackerman returned to the hospital at about 3:30 p.m. and spoke with Dr. Graupera, chief of staff.[9] Ackerman told Graupera what had happened and explained that she had quit in an emotional state and had not given her formal resignation. She told him she wanted her job back. Graupera said he would speak to DON Burkhardt and instructed Ackerman to return the following day. In fact, later that day, Graupera met with Burkhardt and told Burkhardt that Ackerman regretted resigning. Graupera told Burkhardt that he enjoyed working with Ackerman—that she was a good scrub tech. Graupera asked what would happen. Burkhardt told Graupera that Ackerman abandoned her post and her actions were totally unacceptable. Her resignation would be accepted.

On the following day, Ackerman reported to work at her normal time, 7 a.m. She spoke to Johnson and told her that she wanted to work at the Hospital and asked what she could do to make things right. According to Ackerman, Johnson said the discussion was over and told Ackerman to go see Burkhardt. According to Johnson, she told Ackerman that she did not know whether they could work things out. She told Ackerman to meet with Burkhardt.

Ackerman met with Burkhardt later in Burkhardt's office. Ackerman told Burkhardt she wanted to come back to work at the hospital and felt she was an asset and the matter could be worked out. Burkhardt told Ackerman that she had abandoned her post and her action was totally unacceptable. Burkhardt handed Ackerman a blue envelope containing Johnson's acceptance of Ackerman's resignation dated October 4. Burkhardt continued by telling Ackerman that her paycheck was in the mail. Burkhardt said that Ackerman's employment would not benefit the hospital. Burkhardt instructed Ackerman that she did not need to go to human resources. Burkhardt said Ackerman's resignation was accepted and she wished Ackerman well.

By letter of October 5 to CEO Beck, Ackerman stated that it was not her intention to resign. Rather, she wished to remain an employee. Ackerman continued that she had rescinded her resignation to Graupera who said he would advise Burkhardt.

No replacement had been hired on October 5 and none was hired at least through the date of the hearing. Rather, Cheney has handled Ackerman's on-call duties and several per diem nurses have been hired to work in surgery and recovery. They perform scrub duties when necessary.

Martinez explained that the hospital's policy regarding employees who walk off their jobs is to consider them ineligible for rehire. Martinez made a search of the files going back 5 years and found that 10 employees had either left or resigned without providing 2 weeks' notice.[10] Martinez found no evidence that any of these employees had attempted to rescind their resignations. In each case, Respondent's records indicated that the employee was not eligible for rehire. Additionally, prior to drafting the letter accepting Ackerman's resignation, Martinez investigated the situation and concluded that although Ackerman claimed she was harassed into quitting, any alleged harassment had nothing to do with Ackerman's activities on behalf of the Union.

Respondent's policy provides:

> Employees may voluntarily terminate their employment by submitting a written letter of resignation to the Hospital Administrator to provide time to find and train a replacement for the employee. The Hospital asks at least two weeks' notice prior to the effective date of the resignation. Supervisory employees are asked to give at least four weeks advance notice of resignation.

In practice, Respondent accepts verbal resignations. Interestingly enough, in May 2000, Beck's son's fiancée abandoned her job. She too was considered ineligible for rehire.

Counsel for the General Counsel suggests that the meeting between Johnson and Ackerman must be considered in light of Johnson's August 5 interrogation of Ackerman and Miller's four subsequent one-on-one meetings with Ackerman. Counsel avers that through these encounters, it became apparent to

[9] Graupera is not an employee of Respondent. All physicians are independent contractors. They did not report to CEO Beck. Physicians do not have authority to direct hospital personnel decisions.

[10] An additional four employees failed to report for work.

Respondent that Ackerman's support for the Union was not easily shaken. Against this backdrop, Johnson called Ackerman into a meeting to criticize her for, among other things, being a "know-it-all" and leading the other surgery technician by the nose, all of which counsel avers was simply thinly veiled reference to Ackerman's support for the Union. At the end of the conversation, when Ackerman had become emotionally distraught, Johnson informed her that her pay was being cut. Ackerman viewed this as the last straw and blurted out that she quit.

Counsel for the General Counsel contends that this verbal harassment, to the point where Ackerman had no choice but to quit, constituted a constructive discharge, relying on *Pinter Bros.,* 227 NLRB 921, 936–939 (1977), enfd. 591 F.2d 1331 (2d Cir. 1978), and *American Licorice Co.,* 299 NLRB 145 (1990). Alternatively, counsel contends that Respondent violated the Act by refusing to allow Ackerman to rescind her resignation or refusing to hire her as a new employee, relying on *Southwire Co.,* 277 NLRB 377 (1985), enfd. 820 F.2d 453 (D.C. Cir. 1987); *Charles Batchelder Co.,* 250 NLRB 89 (1980), enfd in part and modified in part, 646 F.2d 33 (2d Cir. 1981); *Waterbed World,* 286 NLRB 425 (1987); *Iroquois Foundry Systems, Inc.,* 327 NLRB 652 (1999); and *Forrest City Machine Works, Inc.,* 329 NLRB No. 85 (1999). Counsel further asserts that only minor inconvenience was caused by Ackerman leaving about 1 hour prior to her regularly scheduled departure. Accordingly, counsel argues that there was no justification for the "resulting industrial capital punishment."

Respondent argues that Ackerman abandoned her job. As Burkhardt told Ackerman when Ackerman attempted to rescind her resignation, when Ackerman walked off the job, the Hospital had to pay overtime to cover her remaining duties and then had to pay a registered nurse to take call for Ackerman. Respondent argues that its action had nothing to do with Ackerman's union activity. Rather, Respondent consistently refuses to rehire employees who have walked off the job, abandoning their position. Respondent contends that Ackerman was not constructively discharged because there is no evidence that Johnson's meeting with Ackerman was so difficult or unpleasant as to force a resignation much less tied in any way to Ackerman's union activity. Respondent argues that it did not improperly refuse to rehire Ackerman but, rather, acted consistently with its uniformly enforced policy toward all employees.

Generally, I credit Ackerman's testimony. Nevertheless, I do not find that the verbal counseling administered by Johnson was motivated by a desire to cause Ackerman to quit. Nor do I find that Ackerman was constructively discharged. In order to establish a constructive discharge, there must be evidence that the burdens imposed on the employee caused and were intended to cause a change in working conditions so difficult or unpleasant as to force her to resign. Second, it must be shown that these burdens were imposed because of the employee's union activity. *Crystal Princeton Refining Co.,* 222 NLRB 1068, 1069 (1976). There is no evidence that the reduction in Ackerman's callback pay was anything more than a one-time event caused by her tardiness on September 25. Although, accepting Ackerman's version of the conversation, it was certainly an unpleasant conversation, it did not create such a difficult or unpleasant situation generally that Ackerman was forced to choose between exercising her Section 7 rights or quitting.

Regarding the General Counsel's allegation that Respondent unlawfully refused to allow Ackerman to rescind her resignation as well as the allegation that Respondent unlawfully refused to rehire Ackerman, the General Counsel has the initial burden to establish a case sufficient to support an inference that union or other activity which is protected by the Act was a motivating factor in Respondent's action. The General Counsel must establish union activity, employer knowledge, animus and adverse action. Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent presents such evidence, the General Counsel is then required to rebut the Respondent's defense by demonstrating that the discrimination would not have taken place in the absence of the employee's protected activities. *Wright Line,* 251 NLRB 1983 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

The General Counsel has established a strong case in which there is ample evidence of Ackerman's union activity, knowledge of the activity, and animus toward the activity. The timing of the refusal to accept recession/refusal to rehire also supports an inference that protected activity was a motivating factor. Although I do not agree that the substance of Johnson's conversation with Ackerman was sufficient cause for constructive discharge, I do agree that many of Johnson's remarks were thinly veiled references to Ackerman's union activities. Thus, when Johnson noted that Ackerman was leading the other surgery technician around "by the nose" and when Johnson told Ackerman that the surgery nurses no longer enjoyed working with Ackerman because Ackerman was a "know it all," these remarks can only be understood in light of Ackerman's strong, outspoken support for the Union.

Respondent contends, nevertheless, that it would not have accepted recession of the voluntary resignation absent Ackerman's union activities. Clearly, Ackerman abandoned her job. Clearly, Respondent was forced to pay overtime to cover the duties remaining at the time Ackerman left. Indeed, Respondent was also required to pay a higher standby rate the evening of October 4 because a registered nurse took the standby hours in place of Ackerman. However, these monetary inconveniences have been carried forward to the date of the hearing. Ackerman was never replaced and the registered nurse continues to replace Ackerman for standby purposes. Accordingly, it is difficult to understand that the monetary aspect of Ackerman's job abandonment sufficiently explains failure to accept her attempt to rescind the resignation.

In addition, it is difficult to understand refusal to accept recession based upon patient-care considerations. Ackerman did not leave in the middle of a surgery or leave the Hospital with insufficient equipment to meet any emergency demands. Of course, she should not have left so precipitously. She realized this and within an hour of leaving, spoke with Dr.

Graupera about the situation. Graupera, in turn, spoke with Burkhardt later that afternoon about allowing recession of the resignation. However, by that time the decision to accept the resignation had been made. On the following morning, Burkhardt refused to allow Ackerman to rescind the resignation. There is no precedent at the Hospital regarding rescission of resignations. I note, however, that Ackerman had worked for Respondent for 4 years. She was at least an adequate employee. No concerns have been raised regarding her attendance or competence. She occupied a highly skilled technical position with Respondent. From a business point of view, there does not seem to be any reason for failure to accept recession of the resignation. There is no evidence that Ackerman was in the habit of abandoning her job. Having considered these facts, I find that Respondent has not shown that it would not have allowed recession of the resignation absent union activity. Accordingly, I find that Respondent violated Section 8(a)(3) when it refused to allow Ackerman to rescind her resignation.

IV. REPRESENTATION CASE

A. Procedural Background

On August 13, the Union filed a petition in Case 32–RC–4664 to represent certain employees of the Employer. Pursuant to a stipulated election agreement a secret ballot election was conducted on October 6 and 7 in two collective-bargaining units as follows:

> NON-PROFESSIONAL UNIT: All full-time, regular part-time, and on-call non professional employees, including all service employees, maintenance employees, technical employees and office employees employed by the Employer at its hospital located in King City, California, and its clinics located in King City, California, and Greenfield, California: excluding all Doctors, Registered Nurses, managers, confidential employees, employees who do not regularly average 4 or more hours per week in the 13 weeks preceding the payroll cut-off date for eligibility, guards and supervisors as defined in the Act.
>
> PROFESSIONAL UNIT: All full-time, regular part-time, and on-call professional employees, employed by the Employer at its hospital located in King City, California, and its clinics located in King City, California, and Greenfield, California: excluding Doctors, Registered Nurses, managers, confidential employees, employees who do not regularly average 4 or more hours per week in the 13 weeks preceding the payroll cut-off date for eligibility, guards and supervisors as defined in the Act.

Employees in the nonprofessional unit (about 138 eligible voters) voted 65 to 65 on the representation issue. However, 5 votes were challenged by the Union based on alleged supervisory or managerial status. These 5 challenges are sufficient in number to affect the results of the election.

The ballots in the professional unit requested that employees decide whether they desired to be represented by the Union and, in addition, whether they desired to be included in a bargaining unit with the nonprofessional employees. The tally of ballots in the professional unit indicates that of 13 eligible voters, 2 voted for the Union, 6 voted against the Union, and 5 were challenged. These 5 challenges are sufficient in number to affect the results of the election. On the issue of inclusion with nonprofessional employees for purposes of collective bargaining, 3 employees desired inclusion, 5 did not desire inclusion and 5 were challenged, a number sufficient to affect the results of the inclusion issue.

Following objections to conduct affecting the results of the election, filed by the Employer and the Union, the Regional Director for Region 32 issued a report and recommendation on challenged ballots and objections on March 2, 2000. The Employer's objections were overruled. The Union's objections and the challenged ballot determinations were consolidated with the unfair labor practice proceedings.

A. Challenged Ballots—Nonprofessional Unit

The Board challenged the ballots of Carla Mullanix-Ackerman, Maria Rodriguez, Barbara Bensen, and Grasiela Sanchez because their names were not on the eligibility list. The ballot of Graciela Navarro was challenged because she had already voted. As mentioned, two of these challenged ballots have been resolved: the parties have agreed to overruling the challenge to Grasiela Sanchez who was inadvertently omitted from the eligibility list while she was on maternity leave. The parties have further agreed to sustain the challenge to the ballot of Graciela Navarro. Carla Mullanix-Ackerman was discharged, allegedly in violation of Section 8(a)(1) and (3) of the Act. The challenge to her ballot will be resolved in the unfair labor practice discussion which follows.

Both Maria Rodriguez and Barbara Bensen, the remaining two challenges, are on-call employees. The parties' stipulated election agreement provides that on-call employees are eligible to vote if they average 4 or more hours of work per week in the 13 weeks preceding the election eligibility date, in this case May 24 through August 22.[11] The parties agree, and the evidence reveals, that Maria Rodriguez worked sufficient hours to meet the parties' eligibility standard. The parties further agree that Barbara Bensen averaged 3.96 hours of work per week during the 13-week period based upon working 51.5 hours during the 13-week period. The issue with regard to Bensen is whether her compensated time spent on call should be included in the average hours of actual work per week.

Bensen is an ultrasound technician who works on weekends, as needed. During the relevant time period, Bensen worked as follows:

Date	Hours
May 29	6.5
May 30	6.0
July 3	6.0
July 31	6.5

[11] This formula was based on the Board's decision in *Sisters of Mercy Health Corp.,* 298 NLRB 483 (1990), and *Northern California Visiting Nurses Association,* 299 NLRB 980 (1990). These cases applied the formula set forth in *Davison-Paxon Co.,* 185 NLRB 21, 24 (1970) (4 or more hours per week during the quarter prior to the eligibility date).

August 1	6.5
August 7	8.5
August 8	7.5

Bensen lives in Paso Robles, about 45 minutes away from the hospital. When Bensen is called to work a shift, upon completion of the shift, she remains on standby for a specified period of time after the shift ends. Bensen was paid for 108.75 hours of standby time during the relevant time period.

While on call, employees must be available to report to work within 20 minutes. Employees who do not live within 20 minutes of the hospital, such as Benson, are housed, at the hospital's expense, at a hotel in King City. While on call, employees must wear a beeper and must be ready to report to work. Employees do not perform any work while on call but they are paid standby pay.

Respondent's policy manual provides,

> Due to the 24-hour operation of the Hospital, it is necessary for employees in certain departments to be "one-call" at night, on weekends, and on holidays. "On-call" for employees in these departments is scheduled based on the needs of the patients and the Hospital. The Hospital will compensate employees who are scheduled for "on-call" at a per hour rate of pay established by the hospital. "On-call" time is not considered as hours worked for overtime purposes.
>
> The Hospital recognizes the valuable service provided by employees who are called back to work while "on-call". Employees who are "on-call" and who are called back to the Hospital will be paid one and one-half (1 ½) times their straight time hourly rate of pay for all time actually worked. If the entire amount of time the employee actually works after being called back is less that one hour, the Hospital will pay the employees for one hour at one and one-half (1 ½) times the employee's straight time hourly rate of pay.

The Union asserts that Bensen is an eligible employee because when Bensen's time spent in standby status, for which she was compensated standby pay and was required to stay at a hotel near the Hospital, is added to her actual time at work in the hospital, she meets the eligibility criteria. On the other hand, Respondent contends that Bensen is not an eligible employee, noting that the parties' stipulated election agreement specifically tracked the holding in *Sisters of Mercy Corp.,* 298 NLRB 483, 484 (1990). Respondent asserts that no case following the formula adopted in *Sisters of Mercy* includes standby hours in the calculations.[12] Further, Respondent notes that in *Riverside Community Memorial Hospital,* 250 NLRB 1355, 1356 (1980), the Board specifically failed to include on-call hours to determine an employee's eligibility, stating, "this factorizes to approximately 6 hours of actual work per week from the time she began to work on a strictly 'on-call' basis to the eligibility date." Id. Further, Respondent analogizes to decisions pursuant to the Fair Labor Standards Act regarding whether on-call time constitutes working time. Respondent points to decisions which hold that time spent on call when required to wear a pager, stay sober, and report within a set amount of time, is not compensable working time. Based upon these considerations, Respondent urges that Bensen does not work a sufficient number of hours with sufficient regularity to share a community of interest with regular employees.

There is no dispute that Bensen performs bargaining unit work. Moreover, the fact that her hours are usually scheduled for weekends does not disqualify her.[13] As to regularity of employment, my analysis is guided by the parties' stipulated election agreement incorporating the formula set forth in *Sisters of Mercy*.[14] *Sisters of Mercy* provides that employees are eligible to vote, "if they regularly average 4 hours or more of work per week during the quarter prior to the eligibility date." 298 NLRB at 484. The parties' election agreement excludes from the unit, "employees who do not regularly average 4 or more hours per week in the 13 weeks preceding the payroll cut-off date for eligibility." I note that the word "work" does not appear in the stipulation. Although it might be argued that failure to use the word "work" in the stipulation agreement contemplated use of standby time as well as actual hours worked, I decline such an interpretation.[15] Extrinsic evidence that the parties intended to incorporate *Sisters of Mercy* resolves any ambiguity regarding failure to use the word "work."[16] Moreover, in the absence of this extrinsic evidence, any ambiguity must be construed in accord with established Board policies.[17]

There is no precise authority regarding whether time spent in an on-call basis may be included in time actually spent caring for patients in the Hospital in order to satisfy the eligibility standard. However, cases applying *Davison-Paxon* and *Sisters of Mercy* have uniformly considered only actual hours worked.[18] However, in my view, it is unnecessary to determine whether the on-call hours should be added to determine

[12] Respondent cites *S.S. Joachim & Anne Residence,* 314 NLRB 1191, 1193 (1994); *Trump Taj Mahal Assoc.,* 306 NLRB 294, 295 (1992).

[13] See, e.g., *Bob's Ambulance Service,* 178 NLRB 1 (1969).

[14] There is no evidence of significant disparity in the number of hours worked by on-call nurses such as was present in *Marquette General Hospital,* 218 NLRB 713 (1975) (applying an eligibility formula of working 120 hours in either of the two quarters preceding eligibility date).

[15] Where the parties' intent does not contravene established Board policy, the Board will not override the parties' intent as expressed in the stipulation agreement. *Windham Community Memorial Hospital,* 312 NLRB 54 (1993) (stipulation allowed per diem employees to vote if regularly scheduled to work 16 or more hours in 6 of 13 weeks covered); *S & I Transportation,* 306 NLRB 865 (1992) (stipulated election agreement clearly excluded employees at another facility).

[16] Where the parties' election agreement is ambiguous, extrinsic evidence may be utilized to resolve ambiguities. *Gala Food Processing,* 310 NLRB 1193 (1993).

[17] See, e,g, *Venture Industries,* 327 NLRB 918, 919 (1999); *K. Van Bourgondien & Sons,* 294 NLRB 268, 273 (1989).

[18] See, e.g., *Valley Community Services,* 314 NLRB 903, 919 (1994) (only actual hours worked considered); *Brattleboro Retreat,* 310 NLRB 615, 627 (1993)(4 hours or more of work per week); *Riverside Community Memorial Hospital,* 250 NLRB 1355, 1356 (1980) (although employee was on call 60 hours during relevant period, only time actually spent at work was utilized to determine eligibility);

Bensen's eligibility. Bensen meets the eligibility requirement based upon actual hours worked. That is, an average of 3.96 hours worked is in actuality, an average of 4 hours worked.[19] Accordingly, the challenge to her ballot is overruled.

C. Challenged Ballot—Professional Unit

The professional unit includes dieticians, family counselors, social workers and laboratory scientists as well as other miscellaneous classifications or jobs. The Union challenged 5 professionals' ballots based on alleged supervisory or managerial status. The five challenged employees are as follows:

Beth Bartel	Utilization Review Coordinator
Lynn Classen	Physician's Assistant
Lynda Locke	Staff Development Coordinator
Janeel Welburn	Performance Improvement Coordinator
Maryanne Woodford	Physician's Assistant

The issue with regard to the challenges of Bartel, Locke and Welburn is whether or not they are managers. An individual is considered managerial if he formulates or implements the Employers policies. A finding of managerial status depends on the extent of discretion invested in the particular individual. Usually a managerial individual holds an executive position and is closely aligned with management. Thus, placing such individuals in the bargaining unit would create a conflict of interest.

> Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

NLRB v. Yeshiva University, 444 U.S. 672, 682–683 (1980) (citations and footnotes omitted). The reason managerial employees are exempted from the coverage of the Act is to ensure, "that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union." Id. 444 U.S. at 687–688.

1. Beth Bartel

Beth Bartel is the Utilization Review Nurse. She has been at the hospital for 13 years. Most recently she has held the Utilization Review position for 3 years. She held that position previously for 7 years. In the interim, she worked as skilled nursing director for the SNF. Her hours are 8:30 to 5 Monday through Friday. She could not vary these hours because she needs to be available when insurance company personnel are available. She does not get paid overtime. She does not work on call. She reports to the Director of Nursing. Bartel does not supervise any employees. Her job is to be, "a representative [of the hospital] for Medicare and Medical, and others, to be sure that every patient that's admitted receives the services they need at the most appropriate level of care, in the most timely fashion, and in an economically feasible manner." Her primary contacts are reimbursement sources. She also talks to physicians and patients and their families.

Bartel regularly attended department head meetings until the time of the election. Until that time, she considered herself part of the management team.

To effectuate her role, Bartel reviews patients' charts upon admission and during the length of their stay. She applies the specific criteria set forth in Interqual, the criteria selected by the medical staff and utilized by many insurance companies, to determine the level of care applicable in each case. Bartel reads the admitting and concurrent reviews, which are prepared by attending physicians, in order to monitor the medical necessity for each patient's care. Based on the Interqual criteria, Bartel writes notes to the treating doctor asking for justification for stays in the hospital. In case of lack of consensus between Bartel and the attending physician, a physician review is implemented.

Bartel also communicates with the reimbursement sources regarding coverage. She could spend up to 4 hours a day on the phone with these reimbursement sources. When reimbursement is denied, she works with the physician to appeal. She submits reports to the treatment and surveillance committee. These reports contain raw data. Utilization review operates under the medical staff. MediCal has an on site reviewer who visits the hospital once a week.

In reviewing patient charts, on two occasions Bartel has noticed staff mistakes and passed this information on to the appropriate supervisor. She is unaware what, if any, discipline may have taken place. The hospital's incident report policy allows any individual to make such a report of a mistake.

Respondent argues that the Union failed to prove that Bartel is a manager. Respondent notes that Bartel did not formulate management policy and had no discretion to deviate from Respondent's policies. Bartel, according to Respondent, merely evaluated whether patients were receiving the correct level of care. Respondent relies particularly on *S.S. Joachim & Anne Residence,* 314 NLRB 1191 (1994), in which social workers who assessed social needs of residents, formulated treatment plans, and followed through on established goals were held not to be managers because they did not engage in decisionmaking and had no discretion to deviate from the employer's policies.

I find that Bartel is a managerial employee. Bartel effectuates the fundamental policy of the hospital of maximizing reimbursement for patient care. Such reimbursement is an economic necessity. Not only does Bartel review all patient treatment in order to determine whether it

[19] Anyone familiar with the saga of Nellie Fox in seeking admission to the Baseball Hall of Fame will sympathize with this holding. During his lifetime, Fox received a vote of 74.6 percent, falling short of the 75-percent requirement. The rule was changed later to allow rounding up. Thereafter, Fox was posthumously admitted.

will meet reimbursement standards, she addresses deviations from reimbursement standards with the treating doctors in order to understand the treatment and provide meaningful explanations to the reimbursing entities. Thus, she recommends actions which implement employer policy.

2. Lynda Locke

Locke is an RN who has worked for Respondent for 31 years. She has been Staff Developer for three years. She works 10 hours per day, 4 days per week from 8 a.m. to 6 p.m. She does not work on call. Until shortly before the election, she attended department head meetings.

Locke orients new employees once each month. She arranges speakers for this one-day hospital-wide orientation and compiles the outline of the topics. She contributes to upgrading orientation material and works with orientation presenters to make sure new rules and regulations are incorporated into the orientation presentation.

Each new employee gets an orientation binder which Locke compiles. She decides what to include in the binder by consultation with the orientation speakers. If there are new policies, she adds them to the binder. Presentations include confidentiality, infection control, life safety, hazardous materials, fire safety, and similar matters. Locke has never had to recommend discipline due to these meetings. Employees sign in for orientation. If an employee does not show up, she lets human resources know but does not make any recommendation. Human resources bring their own materials for these meetings.

Locke also provides continuing education for the certified nurses' assistants and other licensed personnel. She conducts 24 hours of classes each year. Locke assembles the class materials and administers the post-class test. Locke assigns each student a grade on the test. The course material is to a large part dictated by the State and the remainder is recommended by supervisors who identify problem areas that need to be covered.

Locke monitors the continuing education units of employees. However, it is not necessary for employees to take the classes given at the hospital. Locke keeps track of hours in order to certify how many hours have been attended by employees.

Locke has an office in a building behind the hospital. There are four offices in it. The placard outside her office says "education." Utilization review, developmental director, volunteer director, and environmental services are also in that building. She shares her office with utilization review.

Locke reports to the DON. The DON writes Locke's evaluation. She is a certified staff developer in the State of California.

Locke does nursing orientation and prepares the orientation materials, revising and upgrading the documents as needed. These are similar to new employee orientation and involve competency tests. She works with the nurse managers to see if there is any information they want put in and the State regulations control what information is put in. She administers nursing competencies and has an annual skills day. Results are sent to the nurse manager of each unit. RNs, CNAs and LVNs (licensed nursing staff) are included in the competency tests. She and the other nurse managers determine which competencies will be tested. They work as a team. This is hospital-wide competencies. There are 4 or 5 stations and she handles one of these and the nurse managers handle the others. As to specific department competencies, these are administered by the nurse managers. If an LVN or any individual cannot perform the competency Locke is administering, she consults with the nurse manager in order to determine what the employee needs in remedial help and at a later time the employee is re-evaluated.

Locke coordinates a health fair, a community service, once a year at the local fairgrounds. Locke assembles volunteers for a health fair team of 4 or 5 individuals who assist in setting up the fair. The purpose of the fair is to let the community know what medical services are available to them in Monterey County. Nonprofit groups are invited to set up booths at the fair. Locke or the team reserves the fair ground and advertises the fair. The fair lasts 4 hours. The employees who volunteer are paid for their time. Locke has never asked a team member to leave the team. She gives certificates of completion at a meeting. Locke assigned the tasks to each individual. These individuals reported back to Locke regarding expenditures.

Respondent argues that Locke is neither a supervisor nor a manager noting that she does not develop policies. Rather, Locke hosts and organizes orientation and teaches some classes.

I find that Locke is a managerial employee. Her duties include more than mere dissemination of the employer's policies. In organizing hospital-wide orientation sessions, she determines which policies need updating and explaining and she determines which speakers can provide meaningful guidance to new employees in order that the Employer's policies will be effectively understood and complied with. These duties are crucial to implementation of the policies. Moreover, Locke conducts continuing education classes for all licensed personnel and for RNs in order to effectuate the important hospital policy of retaining employees with current licensure. She administers tests to these employees and devises remedial activity for employees who do not satisfy various competencies. In all of these duties, Locke "represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy."[20]

3. Janeel Welburn

Welburn, a registered nurse since 1986, was Medical Staff Performance Improvement Coordinator during the relevant time period, May to October 1999.[21] She had worked for Respondent for about 4 years at the time of the hearing. In her capacity as performance improvement coordinator, Welburn assisted performance improvement committees, working as a facilitator. Her specific goal was to devise a way to quantify employee performance criteria so that improvement could be measured. The job description for Welburn's position provides,

> In collaboration with the Governing Board, Administrative Staff, Medical Staff and all employees, the Performance

[20] *NLRB v. Yeshiva University*, 444 U.S. at 683.

[21] She serves currently as a per diem employee in utilization review.

> Improvement Coordinator assists in development, implementation, coordination and support of all performance improvement activities. Works in collaboration with Director of Clinical Services, Quality Assurance, Risk Management and Utilization Review activities for coordination of data and identification to improve.

Requirements for filling the position of performance improvement coordinator were a bachelor's degree in a relevant field, 5 or more years of management experience, and flexibility and maturity. Welburn worked roughly 8:30 a.m. to 4 p.m. but was free to set her own hours within certain core hours required by the hospital. Welburn was paid an hourly rate of about $34 for 80 hours every 2 weeks.[22] She completed a timecard and turned it in to payroll herself. She was classified as an exempt employee for wage and hour purposes. She was not on call.

Welburn occupied an office in the administration building, a nonpatient care building, next to the office of CEO Beck, to whom she directly reported. As performance improvement coordinator, Welburn consulted with Beck about 1 or 2 times per week although she saw him, in passing, on a daily basis.

Welburn was responsible for annual development, review and revision of performance improvement activities of the medical staff. In order to effectuate these duties, she gathered performance improvement information from each of the medical departments and reviewed the material to ensure that each department chose all required indicators and areas pursuant to the Joint Commission on Hospital Accreditation guidelines. Each medical department submitted performance improvement information to Welburn on a staggered quarterly basis. When the information was complete, Welburn submitted the information to the medical staff for questions or comments.

When a request is submitted to the quality council committee targeting a problem area, Welburn forms special performance improvement teams. The quality council committee initially determined whether a PI team should be formed. The person requesting the team suggested whom the team members should be. Welburn assisted the teams in analyzing performance improvement. She set up meeting dates after consulting with team members about availability and set report dates. The meetings usually took place in Welburn's office although sometimes they were in the administrative building conference room. When an employee did not appear for a team meeting, she would consult the employee about why they were not present. No employee was required to serve on a committee unless the employee wanted to do so. Welburn then reviewed the reports and submitted them to the quality council committee. Welburn estimated that there were generally about five special performance improvement teams in existence.

Welburn was a member of the Quality Council Committee as professional improvement representative. As the performance improvement representative, Welburn also attended the committee meetings for Surgery QRC, Medicine QRC, operative and invasive/special care services, treatment and surveillance/health information, patient rights and organizational ethics. As to the Surgery and Medicine QRC, which were peer review committees, she made sure the performance improvement information was given to the specific staff members. She did not take part in peer review although she was present during the discussions. She was there to provide information only. In the operative and invasive committee meetings, she attended to answer questions about performance improvement reports and to serve as liaison to the staff. Not everyone on the standing committees was a member of management or a supervisor.

As performance improvement manager, Welburn attended bi-monthly department managers meetings to give a performance improvement report. Welburn explained that she began attending these meetings on her own initiative. Eventually the attendance list sign-in sheet listed her name. Welburn's role at these meetings was to give a report on performance improvement throughout the hospital.

When Welburn needed a personal day off, she would talk to the CEO about scheduling these. She had 2 weeks' vacation and 10 days of sick leave, just as any other employee covered by the personnel manual. Sick leave was based on years of service.

Welburn was sent to seminars about performance improvement. She rewrote the hospital-wide policy and procedure manual in December 1998. Consultants of the hospital recommended specific revisions. Additionally, Welburn proposed changes to the manual to reflect updated commission standards.

During the election campaign, Welburn wrote a letter against unionization which she sent to all employees. She composed this letter at home and wrote it on her home computer using her own paper. It was mailed at her expense. In the letter, Welburn stated that she attempted to solve some workplace problems when she was a manager. By this, she meant that when she was med/surg ICU coordinator. She occupied that position until December 1998.

Respondent characterizes Welburn's duties as clerical or ministerial, asserting that she spends the majority of her time gathering data and typing. Respondent relies on *Triad Mgmt. Corp.,* 287 NLRB 1239 (1988), in which an employee was held ministerial because she had no discretion in making decision. Respondent also cites *NLRB v. Louisville Gas & Elec. Co.,* 760 F.2d 99 (6th Cir. 1985), in which data records analysts who monitored pollution findings, flagged violations, and drafted possible remedial solutions were held not managerial because they had no authority to make fundamental decisions about compliance.

I find that Welburn is a managerial employee. She is directly involved in preparation of the Hospital's policies and procedure manual. She proposes changes to the manual based upon changes in the law or regulations. She works with the labor relations consultants regarding language in the manual. In addition, through her work in performance improvement, Welburn effectuates and implements the fundamental goal of the Hospital that excellent patient care be provided. Welburn is thus aligned with management.

[22] This is the same rate of pay which Welburn made in her prior position, supervisor in the medical/surgical unit, an admitted supervisory position.

4. Lynn Classen and Maryanne Woodford

The remaining two challenges are no longer determinative. However, in an excess of caution, I will resolve these challenges as well. Classen and Woodford worked in Respondent's clinics as physicians' assistants during the relevant time period. They were challenged by the Union based upon alleged supervisory status. Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of proving that an individual is a supervisor within the meaning of Section 2(11) rests with the party asserting supervisory status.[23]

Neither Classen nor Woodford was available to testify. Guat Beckwith, planning manager for the clinics, was a nursing supervisor for the three clinics until October 1999. She is familiar with the physicians' assistants' duties. Their job description provides,

> Under general direction to do difficult professional level work in providing a variety of primary diagnostic and medical care services and to do related work as required. He/she will individualize patient care based upon the age appropriate and developmental needs. Should be able to demonstrate the knowledge and skills necessary to provide care appropriate to the age of the patients served.

As physicians' assistants, Classen and Woodford examine and diagnose patients and order therapeutic procedures. All physician assistants have RN certification. In performing their work, physicians' assistants instruct CNAs and environmental services employees in performance of their patient-care duties. Physician assistants order lab results. They are paid on an hourly basis and work during the hours that the clinics are open.

Physicians' assistants report possible disciplinary situations to the charge nurse or to Beckwith. Thereafter, Beckwith makes an independent investigation. Physicians' assistants cannot send employees home or take disciplinary action themselves. Physicians' assistants cannot transfer employees or assign them to other areas. Physicians assistants do not have authority to promote, hire, reward, grant raises, establish rates of pay, adjust employee grievances, or write employee performance evaluations.

Respondent argues that the physicians' assistants are not supervisors because they do not discipline, transfer, promote, hire, reward, adjust grievances, or evaluate employees. Routine work assignments which they make are a function of their professional status and are insufficient to confer supervisory status. Respondent relies upon *Providence Hospital,* 320 NLRB 717, 727, 729–730 (1996) (routine assignment or direction to perform discrete task stemming from experience, skills, and training, insufficient indicia of supervisory authority).

I find that the physicians' assistants are not supervisors. Although they may report CNA or environmental services actions to Beckwith, Beckwith follows up with her own independent investigation of any activities and makes disciplinary determinations based upon her independent investigation. Accordingly, the physicians' assistants have only reportorial duties with regard to discipline. Moreover, the physicians' assistants' direction of other employees is within the routine scope of their professional responsibilities and does not constitute the use of independent judgment.

D. Conclusions Regarding Representation Proceeding

In summary, Carla Mullanix-Ackerman, Barbara Bensen, Maria Rodriguez, and Grasiel Sanchez are eligible to vote in the non-professional unit and the challenges to their ballots are overruled. Graciela Navarro is not eligible to vote in the non-professional unit and the challenge to her ballot is sustained. Lynn Classen and Maryanne Woodford are eligible to vote in the professional unit and the challenges to their ballots are overruled. Beth Bartel, Lynda Locke, and Janeel Welburn are not eligible to vote in the professional unit and the challenges to their ballots are sustained.

CONCLUSIONS OF LAW

1. By engaging in the following conduct, Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act:

(a) On an unknown date in August 1999, interrogated an employee concerning her and other employee's union activities; gave an employee the impression that it engaged in surveillance of said employee's and other employees' union activities; and threatened an employee that said employee's and other employees' jobs were "on the line" because of their support for the Union.

(b) On an unknown date in August 1999, threatened an employee with unspecified reprisals if any of said employee's co-workers supported the Union.

(c) On or about August 5, 1999, interrogated employees concerning their Union or other protected concerted activities; threatened employees with loss of their jobs if employees selected the Union to be their collective-bargaining representative; and told employees that they would be permanently replaced if they went out on strike.

(d) On multiple occasions during September 1999, interrogated an employee concerning said employee's and other employees' sentiments toward the Union.

(e) On an unknown date in September 1999, interrogated employees concerning their union activities by accusing them of lying when asked if they signed a union petition and threatened employees with loss of their jobs if they went on strike.

(f) On or about September 30, 1999, offered financial and other benefits to an employee in order to discourage said employee from supporting the Union.

(g) On or about October 1, 1999, at an employee meeting, told employees that they could not wear union buttons at work;

[23] See, *Northcrest Nursing Home,* 313 NLRB 491 (1993); *Ohio Masonic Home,* 295 NLRB 390, 393 (1989).

told employees that it would be futile to select the Union to be their representative; and told employees that they should have brought their problems to it rather than seeking union representation.

(h) On or about October 1, 1999, at an employee meeting, solicited employee grievances and impliedly promised to remedy them.

(i) On or about October 1, 1999, threatened employees with loss of their jobs, reduced wages and loss of benefits if employees selected the Union to be their collective-bargaining representative.

(j) On or about October 6, 1999, interrogated employees concerning their union activities and threatened an employee with job loss and told the employee that if employees went on strike they would all be replaced.

(k) On numerous occasions between July and early October 1999, informed employees that they could not talk about the Union during "work hours" and told employees that they did not need a Union because it was "getting things turned around from them" and that by seeking Union representation, employees were "stabbing" Respondent in the back.

(i) On or about October 7, 1999, after the ballot count in the representation case, in a loud and angry voice, told employees that they were a "bunch of traitors and back stabbers" and told employees they could not talk to their supervisor, she did not want to see any of them, and she did not want to look at them or hear anything they had to say.

(j) At all material times, maintained and enforced in its employee Policy and Procedure Manual an overly broad no-solicitation, no-distribution rule.

(k) At all material times, maintained and enforced an overly broad antiloitering rule.

(m) On or about October 4, 1999, by refusing to rehire Carla Mullanix-Ackerman and/or refusing to allow her to rescind her voluntary resignation, Respondent violated Section 8(a)(3) of the Act.

(n) These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

(o) By the conduct set forth in conclusions of law 1(c)-1(k) and 2, Respondent has illegally interfered with the representation election conducted in Case 32–RC–4664.

REMEDY—UNFAIR LABOR PRACTICE CASE

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

Specifically, having found that Respondent unlawfully refused to allow Carla Mullanix-Ackerman to rescind her voluntary resignation, Respondent shall be ordered to offer her immediate reinstatement to her former position, discharging if necessary any replacement hired since she attempted to rescind her resignation, and that she be made whole for any loss of earnings or other benefits by reason of the discrimination against her in accordance with the Board's decision in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest computed as in *New Horizon's for the Retarded,* 283 NLRB 1173 (1987).

REMEDY—REPRESENTATION CASE

Case 32–RC–4664 is severed and remanded to the Regional Director for Region 32 for the purpose of opening and counting the ballots cast in the nonprofessional unit by Carla Mullanix-Ackerman, Barbara Bensen, Maria Rodriguez, and Grasiel Sanchez and for the purposes of opening and counting the ballots cast in the professional unit by Lynn Classen and Maryanne Woodford. If the revised tally of ballots indicates that the Union has received a majority of the valid ballots cast, the Regional Director shall issue a Certification of Representative.

In the event that the revised tally of ballots reveals that the Union has not received a majority of the valid ballots cast, I recommend that the election be set aside and that the Regional Director for Region 32 direct the holding of a second election at such time as he deems appropriate.

I make this recommendation based upon having found that during the critical period, Respondent violated Section 8(a)(1) and (3) of the Act by interrogating employees; threatening employees with job loss or permanent replacement if they went on strike; offering an employee financial assistance; banning the wearing of Union buttons; telling employees it would be futile to select the Union; inviting employees to come to it with their problems instead of seeking Union representation; impliedly promising to remedy problems; threatening job loss, reduced wages and loss of benefits if the Union were selected; informing employees that they could not talk about the Union during "work hours;" telling employees that they did not need a Union because Respondent was "getting things turned around for them; telling employees that by seeking Union representation employees were stabbing their supervisor in the back; maintaining and enforcing an overly broad no-solicitation, no-distribution rule; maintaining and enforcing an overly broad no loitering rule; and refusing to allow Carla Mullanix-Ackerman to rescind her voluntary resignation, I recommend that the election in Case 32–RC–4664 be set aside.

> It is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since "conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election. However, the Board has departed from the policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results. In determining whether misconduct could have affected the results of the election, we have considered "the number of violations, their severity, the extent of discrimination, the size of the unit, and other relevant factors.

Clark Equipment Co., 278 NLRB 498, 505 (1986) (fn. omitted). Although Respondent argues that many of the violations found should be considered de minimis, I find that the violations were more than mere technicalities. Moreover, I note that the Board presumes dissemination of threats absent evidence to the contrary. See, e.g., *Spring Industries*, 332 NLRB 40 (2000); *Audubon Regional Medical Center,* 331 NLRB 374, 378 (2000).

[Recommended Order omitted from publication.]