St. John's Community Services–New Jersey *and* Communications Workers of America, Local 1037, AFL–CIO. Case 22–CA–26934

August 10, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND BECKER

On May 4, 2006, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

The judge found, among other things, that the Respondent violated Section 8(a)(3) and (1) of the Act by more strictly enforcing the medication administration policy governing its employees, including Nia Gibson, in response to the Union's victory in a representation election among the Respondent's support specialist employees. The judge relied on several pieces of evidence, including the Respondent's discharge of Gibson for her first medication error and a statement by Bill Loyd, the Respondent's acting state director, who told Gibson, "with all this stuff with the union, everything goes through our lawyers now, and we have to go by the book." We agree with the judge's finding, although with two clarifications.

First, regarding the General Counsel's contention that Gibson's discharge was unprecedented, the Respondent argues that the judge erroneously found that there "was no evidence that any other employee had been discharged after his or her first medication administration error." The Respondent points to the testimony of Program Director Michael Peniston, who, when asked whether he was aware of any employee discharged for a first medication error, answered, "I've known of some." Although Peniston's vague, uncorroborated testimony qualifies as "evidence," it does not establish that the Respondent had discharged employees for first medication errors or otherwise undermine the General Counsel's case. Cf. *Adair Standish Corp.*, 290 NLRB 317, 318 (1988), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990) (employer's vague and unsubstantiated testimony failed to establish that employees had been disciplined in the past for attendance problems).

Second, with respect to Loyd's statement that "everything goes through our lawyers now, and we have to go by the book," the Respondent contends that the judge erroneously found that it unlawfully changed its disciplinary procedure by involving its attorney. We find it unnecessary to rely on that portion of Loyd's statement relating to the Respondent's attorney. More important is the final part of Loyd's statement: "we have to go by the book." Loyd's addition of that point makes clear that the Respondent was tightening its disciplinary policy in response to its employees' union activity.

Our dissenting colleague criticizes us for "focusing on one phrase" in Loyd's statement and "ignoring its more extensive context." He contends that, when viewed in context, Loyd's "we have to go by the book" statement merely referred to the Respondent's change in its disciplinary procedure to include more individuals, including counsel, in the decisionmaking. We agree that the context of the statement is crucial. Loyd's statement was made to Gibson as he discharged her for a first medication error—an unprecedented penalty for the Respondent. We view Loyd's statement as an attempt to explain to Gibson *why* she was discharged (and not, as our colleague contends, simply as a description of the process used in making the decision).

Loyd's explanation amounted to an admission that the Respondent, in response to unionization, had adopted a stricter interpretation of its medication administration policy, dictating Gibson's discharge. And, the record confirms that Loyd's admission was factually based. As demonstrated by the judge's discussion of the Respondent's disciplinary practice, prior to unionization, the Respondent inconsistently enforced its medication administration policy.

Our dissenting colleague rejects that finding, but his reasoning is not persuasive. He points out that the General Counsel did not present evidence of any employee who committed *precisely* the same error as Gibson but was not discharged. That observation fails to recognize the relevant evidence, summarized in the judge's decision, which shows that a number of employees had been disciplined for various medication errors, no two of which were exactly the same. The salient fact is that the Respondent had never before discharged an employee for

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

[2] The judge's proposed notice has been modified to conform to the Board's standard remedial language. See *WGE Federal Credit Union*, 346 NLRB 982, 984–985 (2006).

a first medication error—and did so only after the Union was certified.

Our colleague also contends that "a lone statement by an employer to 'go by the book'" because of its employees' choice to be represented, without any corroborating evidence of antiunion animus, is insufficient to show unlawful motive. Yet in *Electrical South, Inc.*, 327 NLRB 270, 281 (1998), the Board adopted the administrative law judge's finding that an employer's statement that it enforced a no-solicitation rule "by the book" because of its employees' union activity established discriminatory motive and violated Section 8(a)(3) and (1). Although the employer in that case committed other violations of the Act, the judge—as our colleague acknowledges—did not rely on any evidence other than the employer's "by the book" statement to find that the change in enforcement was unlawfully motivated. As in *Electrical South*, Loyd's statement that the Respondent had to go "by the book" because of the employees' election of the Union is evidence of unlawful motivation.

In any event, the evidence of unlawful motivation in this case is not limited to Loyd's "lone statement," as our colleague contends. The General Counsel established unlawful motivation through other evidence, as well. As described above, the evidence shows—*indeed, the Respondent admits*—that the Respondent had previously enforced its medication administration policy inconsistently. The evidence further shows that the Respondent discharged Gibson under its stricter, "by the book" interpretation of that policy less than 2 weeks after the Union's certification as the employees' bargaining representative. See *Masland Industries*, 311 NLRB 184, 197 (1993), citing *NLRB* v. *Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (the timing of an adverse action may warrant an inference of unlawful motivation). For all of those reasons, we agree with the judge's finding that the General Counsel has met his burden to show that the Respondent's change in enforcement was unlawfully motivated.[3]

With the clarifications described above, we adopt the judge's finding that the Respondent more strictly enforced its medication administration policy in violation of Section 8(a)(3) and (1) of the Act. Consequently, we also adopt his finding, under *Southern Mail, Inc.*, 345 NLRB 644 (2005), that the Respondent violated Section 8(a)(3) and (1) by discharging employee Gibson pursuant to that more strictly enforced policy.

[3] Under the Board's application of the test established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in cases like this one—where employer action against an individual employee was based on the decision of the work force as a whole to unionize—the General Counsel was not required to prove that Gibson herself engaged in protected concerted activity known to the Respondent. See, e.g., *Southern Mail, Inc.*, 345 NLRB 644, 647 (2005).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, St. John's Community Services–New Jersey, Hamilton, New Jersey, its officers, agents, successors, and assigns shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

MEMBER SCHAUMBER, dissenting.

It is undisputed that the purported discriminatee in this case, Nia Gibson, engaged in no protected concerted activities, broke a preexisting and facially neutral medication distribution rule, and was discharged for that offense consistent with the express terms of the rule, just as other similarly situated employees have been in the past. It is also undisputed that there is no evidence that the Respondent harbored any antiunion animus or engaged in any unfair labor practices during the course of the organizing campaign that occurred shortly before the discharge at issue. My colleagues nonetheless find a violation of the National Labor Relations Act and order Gibson reinstated with backpay because she was told something along the lines of: "with all this stuff with the union, everything goes through our lawyers now, and we have to go by the book" and that "they have to do things different." Unlike my colleagues, I find that statement an insufficient predicate both as a matter of fact and law for imposing liability under our statute. Therefore, I respectfully dissent.

As an initial matter, I am unconvinced that the General Counsel has demonstrated by a preponderance of the evidence in the record that Gibson suffered any adverse action, i.e., that she was subject to disparate treatment or that the Respondent more strictly enforced its medication policy against her. Gibson was discharged for failing to dispense medicine to a consumer, a violation for which she was subject to discharge absent extenuating circumstances. It is undisputed that Gibson did not communicate any extenuating circumstances to Acting State Director Bill Loyd, the person responsible for her discharge. Thus, her discharge was consistent with the Respondent's policy. Moreover, the General Counsel did not present evidence of a similarly situated employee—someone who failed to dispense medicine to a consumer with no extenuating circumstances—who was treated differently than Gibson. Rather, the General Counsel attempted to argue that employees who committed other kinds of medication errors, and who may or may not have presented extenuating circumstances, were similarly

situated to Gibson. Because these employees were not directly comparable to Gibson, I would not find that Gibson was subject to disparate treatment. Thus, I reject the majority's underlying finding that the evidence shows that the Respondent more strictly enforced its medication policy against Gibson.

But even assuming that Gibson was subject to stricter enforcement of the policy, the General Counsel has failed to establish that such enforcement was unlawfully motivated. It is well settled under *Wright Line*[1] that "to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action." *Pontiac Care & Rehabilitation Center,* 344 NLRB 761, 766 (2005); see also *Universal Laundries & Linen Supply,* 355 NLRB No. 17, slip op. at 16 (2006) ("The General Counsel bears the burden of proving by a preponderance of the evidence that animus against protected conduct was a motivating factor in the adverse employment action."). None of the requisite *Wright Line* factors have been established in this case. Instead, the General Counsel and my colleagues premise their theory on isolated excerpts from an ambiguous, and in my view noncoercive, exchange between Gibson and the Respondent's acting state director, Bill Loyd. According to Gibson, Loyd told her during her termination interview that:

> because of everything that's going on with the Union, everything goes through our lawyers now, and we have to go by the book. . . . [W]hen an employee does something, it has to go through their lawyers, first, for their lawyers to look at it. Everybody's looking at it. It's not just one person, like Cheryl [Wesley, human resource director]. Cheryl would just look at disciplinary, you know. Now, it was more people involved. It wasn't just her decision, alone.

Taking these statements at face value, the gist of Loyd's message is simply that given the scrutiny to which its disciplinary actions will now be subject as the result of a grievance and arbitration process, more individuals, including counsel, will be reviewing those decisions and participating in the disciplinary decision-making. Nothing in that exchange compels a finding that the Respondent would be enforcing rules more strictly to punish employees for supporting a union. Indeed, Loyd's statement is neutral and devoid of any hint of antiunion sentiment, animus, or retaliation against employees for voting in the Union.

My colleagues, however, parse out isolated excerpts from Loyd's words to fashion something sinister. They specifically rely on Loyd's statement that the Respondent must now "go by the book" but find it "unnecessary" to rely on Loyd's reference to including its attorney in the disciplinary process. By focusing on one phrase and ignoring its more extensive context, the majority manufactures antiunion motivation out of thin air. Because Loyd's statement is plainly susceptible to a nondiscriminatory interpretation, it does not support a finding of animus, particularly in a case such as this where there isn't a scintilla of other evidence that the Respondent's decision to discharge Gibson was unlawfully motivated. Thus, my colleagues err, as a matter of fact, in finding that the General Counsel established a prima facie case.

My colleagues fare no better as a matter of Board law. The cases relied on by the judge and majority are inapposite. In *Pontiac Care & Rehabilitation Center*, supra, the Board found that the respondent unlawfully discharged the discriminatee because it knew of her union activity and bore animus toward her as a result. 344 NLRB at 767. The respondent stated that "if a union was voted in, that it wouldn't be such a friendly, laid back place. [The respondent] would have to do things by the book." Although the Board found antiunion animus, its finding was not based on this statement alone. Rather, the Board found discriminatory motive in the respondent's "blatantly disparate" treatment of the discriminatee and in the respondent's numerous 8(a)(1) violations, including threats, surveillance, and interrogations. The majority here can point to no such corroborating evidence of animus toward union organizing or other protected activities.

The judge also cited *Treanor Moving & Storage Co.,* 311 NLRB 371 (1993), in which the Board found that the respondent discriminatorily enforced its attendance policy after the union won an election. The Board found that the attendance-policy crackdown was motivated by antiunion animus because, among other things, of statements by the company president that employees "stabbed him in the back" by voting in the union and that he was going to "stab back." Id. at 375. Similarly, in *Nursing Center at Vineland*, 314 NLRB 947 (1994), the Board found that the respondent began to strictly enforce its work rules against unit nurses after the union won an election. Statements by the nurses' supervisor such as "You nurses want to play games, you want a union, you know what is the matter" supported the Board's finding that the respondent's actions were motivated by animus against Section 7 activities. Id. at 948–949. Finally, in

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

Southern Mail, Inc., 345 NLRB 644 (2005), the Board found that the respondent more strictly enforced its DOT log disciplinary policy against drivers for voting in the union. The Board noted the "abundant evidence of the Respondent's motivation to retaliate against employees for their election of the union," including repeated threats against drivers if the union won the election. Id. at 646.

Neither the judge nor the majority cites to a single case in which the Board found that a lone statement by an employer to "go by the book" following a union election, without any corroborating or supporting evidence of union animus, was enough to find unlawful motive. The majority's reliance on *Electrical South, Inc.*, supra., illustrates the point. In *Electrical South* the Board affirmed the judge's finding that the respondent committed 12 different unfair labor practices, including such "hallmark" violations as threatening plant and department closures and laying off employees for engaging in union activities. The majority above focuses on one allegation where the respondent unlawfully disciplined two employees because it was "going to do it by the book." As the majority notes, the judge found that this statement showed antiunion animus, and he did not specifically state that he relied on the other 11 unfair labor practices. Rather, the judge discussed and analyzed this allegation—and each of the 12 allegations—separately. It is hardly reasonable, however, to suggest that the plant atmosphere, poisoned by myriad threats, interrogations, layoffs, and unilateral changes, did not inform the judge's finding of animus. In contrast, this case has not a single example or event to support a finding of antiunion animus. The majority further relies on *Masland Industries*, 311 NLRB 184, 197 (1993), and *NLRB v. Rain-Ware, Inc.* 732 F.2d 1349 (7th Cir. 1984), and claims that the mere timing of Gibson's discharge, 2 weeks after the Union was certified—with *nothing* else—is sufficient to find antiunion animus. But *Rain-Ware* states only that "timing alone *may suggest* antiunion animus." Id. at 1354 (emphasis added). In *Rain-Ware and* all of the cases cited there, the respondents engaged in other unlawful acts that supported antiunion animus as *suggested* by timing. Here, there is only timing.

In sum, the Board has found that actions similar to Loyd's—when supported by other evidence of antiunion animus or retaliation—may violate the Act. The Board has never found that such acts alone are enough to violate the Act. The majority's decision significantly expands the scope of what qualifies as antiunion animus, and it is inconsistent with long-established Board law. Therefore, I respectfully dissent.

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 had 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 a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with Communications Workers of America, Local 1037, AFL–CIO (Union), as your exclusive bargaining representative by making unilateral changes in your terms and conditions of employment which are mandatory subjects of bargaining, without first giving adequate prior notice thereof to the Union and giving the Union a meaningful opportunity to bargain on such changes, including more strictly enforcing our medication administration policy. The appropriate unit is:

> All full-time and regular part-time support specialists and substitute support specialists employed by the Employer at its 10 New Jersey locations located in Lawrenceville, Roselle, South Plainfield, Orange, Farmingdale, Long Branch, Rahway, Cedar Grove, Brick Township and Trenton, New Jersey, but excluding all office clerical employees, managerial employees, professional employees, guards and supervisors (including team leaders) as defined in the Act.

WE WILL NOT discharge or otherwise discriminate against any of you for joining, selecting or supporting Communications Workers of America, Local 1037, AFL–CIO, or any other union.

WE WILL NOT more strictly enforce our medication administration policy against you because you joined, selected, or supported the Union.

WE WILL NOT unilaterally change the enforcement of our medication administration policy by more strictly enforcing its provisions without affording the Union an opportunity to bargain with us over your terms and conditions of employment.

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

WE WILL on request by the Union, rescind the unilateral changes consisting of a more strict enforcement of our medication administration policy until such time as we negotiate with the Union in good faith to impasse or agreement.

WE WILL within 14 days from the date of the Board's Order, offer Nia Gibson full reinstatement to her former positions as substitute support specialist and administrative assistant or, if those positions no longer exist, to substantially equivalent positions, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Nia Gibson whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Nia Gibson, and WE WILL, within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

ST. JOHN'S COMMUNITY SERVICES–NEW JERSEY

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Julius M. Steiner and *Thomas Hearn, Esqs. (Obermayer Rebmann Maxwell & Hippel, LLP),* of Philadelphia, Pennsylvania, for the Respondent.
William G. Schimmel, Esq. (Weissman & Mintz, Esqs.), of Somerset, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge and a first amended charge filed by Communications Workers of America, Local 1037, AFL–CIO (Union) on June 3, 2005, and November 30, 2005, respectively, a complaint was issued against St. John's Community Services–New Jersey (Respondent) on December 8, 2005. On February 28 and March 1, 2006, a hearing was held before me in Newark, New Jersey.

The complaint alleges, essentially, that the Respondent more strictly enforced its medication administration policy upon its employees, including employee Nia Gibson, and discharged her in violation of Section 8(a)(1) and (3) of the Act because of its employees' union activities. The complaint further alleges that the Respondent unilaterally changed the enforcement of its medication administration policy by more strictly enforcing its provisions without affording the Union an opportunity to bargain with it about such conduct, in violation of Section 8(a)(1) and (5) of the Act.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation having its office and place of business in Hamilton, New Jersey, has been engaged in the provision of social services to residents at group homes located throughout New Jersey, including its group home in Brick, New Jersey. During the preceding 12 months, the Respondent derived gross revenues from its operations in excess of $250,000, and purchased and received goods and services valued in excess of $50,000 directly from suppliers located outside New Jersey. The 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 and has been a health care institution within the meaning of Section 2(14) of the Act. The Respondent also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

The Respondent, a nonprofit agency established in 1868, has its headquarters in Washington, D.C., and facilities in four states including New Jersey. Its mission includes the provision of support and programs to individuals with developmental and other disabilities, including the operation of residential group homes. The Respondent's New Jersey headquarters is in Hamilton, where it oversees the operations of its 10 New Jersey facilities, including one in Brick Township, the group home at issue here.

At the time of the incidents at issue, the Respondent's hierarchy consisted of its president, Thomas Wiles, its chief operating officer, Genni Sasnett, and director of human services, Cheryl Wesley, all three of whom were located in Washington, D.C. The New Jersey acting state director was William Loyd, Jr., the program director was Michael Peniston, and the program coordinator was Glenda (Vickie) Atkins. The residential team leader supervised the staff who worked in the group homes, whose titles were support specialists, acting support specialists, and checkers.

In September, 2004, the Union began an organizing drive among the support specialists employed at the Respondent's 10 New Jersey facilities. The campaign became active in November and December, 2004. On December 13, 2004, the Union filed a petition for an election, and on March 29, 2005, it was certified as the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate bargaining unit:

> All full-time and regular part-time support specialists and substitute support specialists employed by the Employer at its 10 New Jersey locations located in Lawrenceville, Roselle, South Plainfield, Orange, Farmingdale, Long Branch, Rahway, Cedar Grove, Brick Township and Trenton, New Jersey, but excluding all office clerical employees, managerial employees, professional employees, guards and supervisors (including team leaders) as defined in the Act.

2. Nia Gibson

The occupants at the Brick, New Jersey group home at issue here were four "consumers," the term applied to the individuals whom the Respondent serves, and one staff person, Nia Gibson. She was responsible for their care and for the administration of their medication. It is the Respondent's policy that it "shall properly manage the acquisition, administration and storage of all medications, prescription and over the counter, for each consumer."

Gibson began work as a substitute support specialist in July, 2003, working weekends and evenings at group homes. Four months later, in November, 2003, she began work full time as an administrative assistant in the human resources department at the Respondent's Hamilton, New Jersey office. She held both positions at the time of her discharge in April, 2005, and had worked at the Brick facility regularly prior to her termination.

Gibson testified that when she first heard that the Union was organizing the employees, she told her then-supervisor, Program Director John H. Williams and her supervisor, Office Manager Amirah Johnson that the employees were "starting a union," and that she was interested in joining. She quoted Williams as saying "no, Nia, that's not good. Don't say that." In addition, she told Johnson that they would have to "get the numbers" so they could get the employees together who want to join the Union. Johnson told her that if the employees want to join a union, "just let them do it." Both Williams and Johnson told Gibson that she could not be involved because she was employed in the human resources department.

Gibson testified that she had no involvement with the Union, and conceded that no supervisor or management official questioned her concerning her union interest or threatened her for supporting the Union.

Williams and Johnson both testified, denying that Gibson told them of her sympathies toward the Union. Johnson conceded, however, that Gibson asked her whether she could participate in a Union if one was chosen by the employees. Johnson replied that she did not believe that Gibson could be included in the bargaining unit because her title of office administrative assistant was excluded from the unit. As set forth above, the unit excludes office clerical employees, and the parties agreed that Gibson was appropriately excluded from the voting unit on that basis. Acting State Director Loyd testified that he was unaware of Gibson's sympathies toward the Union, but recalled a conversation in which she told him that Union pickets were outside the office and asked whether she should call the police.

There is no allegation, and I do not find, that the above evidence supports a finding that Gibson engaged in protected, concerted activities. This case is solely based upon an allegation that the Respondent more strictly enforced its medication administration policy upon its employees, including Gibson, and discharged her, because of its employees' union activities including their joining and voting for the Union.

In the evening of April 3, 2005, Gibson worked as the substitute support specialist at the Brick, New Jersey group home. She was required to administer medication to all four of the consumers, but administered medication to only three.

At hearing, Gibson stated that she forgot to administer Haldol to one of the consumers, and did not do so because she was distracted by persuading one of the consumers to leave the bathroom so that another consumer could use it. Convincing the consumer to leave the bathroom during his regular and extensive use of it was an ongoing problem. She also stated that no checker was employed at the facility, whose job it is to verify that the medications were given and that proper documentation made that the medication was administered. Gibson also testified that the Respondent was supposed to have a consumer to staff ratio of 3 to 1, but conceded that she did not attempt to obtain additional staff or tell anyone that she was short-staffed because that condition was not unusual.

The following day, April 4, the relief support specialist checked the medication administration log and discovered that Gibson had not given medication to one consumer and had not documented that she had. Program Director Michael Peniston immediately met with her, and she explained that she was preoccupied attempting to have one consumer leave the bathroom, and she "just forgot." She asked Peniston what would happen. He replied that she would probably be suspended from working as a support specialist and be retrained in medication administration, but would not be terminated since her error was not related to her full time work as an administrative assistant.

Peniston testified that prior to her discharge, Gibson enumerated certain extenuating circumstances which, in his opinion, should have prevented her termination. She said that she had no checker, and she was the only staff person among four consumers at the home, which was "a little chaotic." She was preoccupied with persuading one consumer to leave the bathroom, and the consumers had just returned from visits and were taking showers. It was Peniston's belief that these constituted valid extenuating circumstances because Gibson's complete concentration was perhaps not attuned to the administration of the medication.

Gibson stated that the Respondent is supposed to have no more than three consumers to each staff member, and that the four to one ratio in effect on April 3 violated state policy. She also noted that if a checker was present he or she may have caught her error.

Regarding the absence of a second staff member or a checker, Loyd testified that the State Division of Developmental Disabilities has a staff to consumer ratio which must be followed on a house-by-house basis. He noted that a 1:3 ratio is typical, but not a requirement. In his opinion, based on his knowledge of the functional abilities of the consumers at the Brick facility, one staff member and four consumers was "manageable." In contrast, Peniston testified that the state requires a 3:1 ratio with which the Respondent was not in compliance on the evening of Gibson's error. Peniston also stated that ordinarily there are two staff members in attendance at the group homes—one to administer the medications, and the other who acts as a checker.

On April 4, Peniston completed an "Initial Incident Report Form" which noted the incident status as "pending," and as actions to be taken, "training" and "staff disciplinary action." Peniston stated that the incident was pending because he had to consult with Loyd, the Respondent's acting state director. Based on his

initial investigation, including his speaking to the consumer's physician, Peniston recommended that Gibson be retrained, which involves classroom training regarding medication administration, a test, and several observed "pours" of medications. Following successful retraining, the employee is permitted to administer medications. Peniston did not set forth any extenuating circumstances in this report. This was Gibson's first discipline in her nearly two years of work for the Respondent.

Peniston testified that he recommended to Loyd that Gibson be retrained, and that Loyd told him that ordinarily Gibson would be suspended, but since she was also employed in the office, she could continue to work in that position. Peniston and Loyd both testified that Loyd suggested that Gibson's work as a support specialist be terminated, but that she continue to work in the office. Peniston responded that he believed that that was a fair resolution.

Peniston did not tell Loyd of any extenuating circumstances mentioned by Gibson because he believed that Loyd's recommendation that she work solely in the office would be the final disposition of the matter. Loyd's testimony was quite different. He stated that he specifically asked Peniston if there were "extenuating circumstances" that should be considered, and Peniston answered that there were none—that it was a typical weekend. Loyd stated that he also spoke to Gibson between the time of her error and her termination, and she did not tell him of any extenuating circumstance which would persuade the Respondent not to terminate her. When Loyd asked her at that time what happened, she simply told him that she forgot to administer the medication and apologized. Following her error, Gibson continued to work in the office as an administrative assistant until her termination 1 week later.

A letter of termination dated April 11, signed by Loyd with a copy to human resources director Wesley, was issued to Gibson. It stated that she was discharged because she failed to administer a consumer's evening psychotropic medication in violation of Policy No. 140 X.B.1.b which states:

> *Medication Errors*—Failures of staff performance in medication administration will have the following consequences:
> *Administration Errors*—For errors related to medication administration:
>
> Failing to give medication to consumer at all without extenuating circumstances (e.g. staff simply fails to give medication without emergency circumstances occurring which prevented the staff from being able to do so)—termination.

On April 15, Peniston prepared a final "Incident Follow-Up Report." He testified that although he disagreed with the decision to discharge her because he was aware of extenuating circumstances, he completed the Report because it simply reported the action the Respondent took. Peniston completed the "Actions to be Taken" part of the report, noting that the medication administration error was in violation of Policy X.B.1.b.—errors related to medication administration without extenuating circumstances.

3. The change in the disciplinary procedure

Peniston testified that up to the point that he met with Loyd the steps ordinarily taken in a disciplinary matter were followed: He (a) completed an Initial Incident Report Form (b) conducted a follow-up investigation in which he interviewed Gibson and the employee reporting the error (c) visited the home and examined the medication log (d) spoke to the consumer's physician and (e) met with acting state director Loyd.

After these steps were taken, typically, both Peniston and Loyd would then call the Respondent's Washington headquarters and speak with human resources director Wesley or chief operating officer Sasnett or both. In that call, the participants would discuss the findings of the investigation, any extenuating circumstances, and the action to be taken against the employee. If it was decided that the employee would be terminated, Peniston, as program director, prepared the termination letter. He would then give the letter to the state director and the human resources director to review for accuracy, and then the employee would meet with the program director and another manager, usually the state director or program coordinator, at a termination interview.

However, unlike the usual procedure, following his meeting with Loyd, Peniston was no longer involved in any actions taken concerning Gibson. He did not participate in a conference call with headquarters, and was not included in any other meeting or discussion regarding Gibson's error or the decision to terminate her during which he would have had an opportunity to discuss any extenuating circumstances contributing to her error. Peniston did not prepare Gibson's termination letter, and learned of her discharge only by e-mail. Peniston was excluded from the discussion concerning Gibson's termination, and apparently because of that Loyd signed the termination letter.

Peniston and Loyd testified to the reasons for the change in procedure. Peniston stated that after he became aware in September, 2004 that the Union was organizing the employees of the Respondent, he was told by president Wiles, chief operating officer Sasnett, human resources director Wesley, and Brian Hudson, the attorney who then represented the Respondent, that before a disciplinary action letter was given to an employee, it must be sent to Wesley and Hudson for their review and advice as to how to proceed. He was also informed that draft termination letters had to be sent to Washington to be proofread.

Loyd stated that after his being appointed as acting state director in January, 2005, one of the "aims" of the Respondent was to "make sure that there was consistency in implementation of the policy"—"[s]ubsequent to my coming in, in January, we really wanted to make sure that the policies were consistently implemented."[1] Loyd testified that prior to his becoming acting state director in January, 2005, consistency in the implementation of the enforcement of the medication administration policy had been an "issue." I interpret this as meaning that there had not been consistent enforcement of the policy prior to January. This will be illustrated below.

[1] The quoted sentence, as set forth in the transcript, contains a period after "January," but the context of the sentence convinces me that it should read as set forth above.

Loyd further testified that after meeting with Peniston regarding Gibson, he consulted with the human resources department and attorney Hudson in order to decide on a course of action. In doing so, he followed his usual procedure of checking with the human resources department regarding a decision to terminate an employee. However, his checking with attorney Hudson was different than the usual procedure because "as a cautionary measure we were running most things by the attorney in those days because of the activities that were occurring regarding the unionization. We were trying to make sure that we were being consistent and fair."

Gibson's pretrial affidavit, which she affirmed at the hearing, stated that Loyd told her at her termination interview that "with all this stuff with the union, everything goes through our lawyers now, and we have to go by the book." She further testified that Loyd told her that "because of everything that's going on with the Union, everything that when an employee does something, it has to go through their lawyers, first, for their lawyers to look at it. Everybody's looking at it. It's not just one person, like Cheryl [Wesley, human resources director]. Cheryl would just look at disciplinary, you know. Now, it was more people involved. It wasn't just her decision, alone." Gibson believed that Loyd was not involved in the decision to terminate her. She stated that he told her that he was waiting for Attorney Hudson and Human Resources kirector Wesley to make their decision "because everything that's going on with the union, they have to do things different."

Loyd stated that according to the policy which Gibson violated, the action called for would be termination or, if extenuating circumstances were present, retraining. Since no extenuating circumstances were presented to him, the decision was made to discharge her. Then a question was presented as to whether she could be terminated just from her job as a support specialist, or from her office position as well.

Loyd stated that the Respondent had no policy as to whether to retain a support specialist who committed a medication error requiring termination, but who is also employed in a clerical capacity. The team consisting of Loyd, Wesley, and Attorney Hudson examined a previous instance where employee Drew Zimmerman held two positions, committed a medication error "of the same caliber and category" as Gibson's, and was terminated. In that situation, they decided that the Respondent could not "partially terminate" an employee. They concluded that either the person remained an employee or was no longer an employee. It was accordingly decided that in order to "maintain . . . consistency in implementing the procedure" Zimmerman's case was a precedent which would be applied to Gibson, and she should be terminated.

Drew Zimmerman was a program coordinator and a substitute support specialist. On November 14, 2004, as the program coordinator, he directed a staff specialist to take medication from one consumer's supply and administer it to another consumer. The Disciplinary Action Form noted that this action was a medication error, and "as the administrator who must guide staff through problem situations, your judgment is crucial." Zimmerman received a written warning and retraining for this error notwithstanding that the medication administration policy states in X.B.1.a. that "giving incorrect medication, e.g., one consumer's medication given to another consumer" requires termination. He continued to work thereafter in both positions.

Thereafter, on January 31, 2005, Zimmerman administered a consumer's psychotropic medication at the wrong time. In considering what disciplinary action to take, Program Director Robert Schwartz, who succeeded Peniston, sent an e-mail to Loyd on February 3, describing Zimmerman's November 14 error as "procedural," and the January error one of "[medication] administration with extenuating circumstances. Vis-a-vis policy I feel termination is not required, but I want to make sure our standards are being upheld evenly for managers. Do you think suspension from meds admin. responsibilities pending in-house re-training, along with the attached DAF [Disciplinary Action Form] sufficiently covers it?"

Loyd replied that Zimmerman could have been immediately terminated for the November error. He stated "I'm sure you see the gravity of this situation in light of the other medication administration issues we're facing with some of the direct staff." Loyd explained at hearing that he thus emphasized to Schwartz that if the Respondent was enforcing its policy strictly with respect to staff members, it must do the same with its supervisors.

Schwartz agreed with Loyd's reasoning, and 1 week later Schwartz signed a letter terminating Zimmerman. The letter stated that the January error violated policy X.B.1.c.2., which required termination for the first occurrence of administering psychotropic medication at the wrong time. The letter also noted that "this was the second serious medication incident you were involved in, the first being your improper instruction to give one consumer's medication to another on November 14, 2004." Copies of the letter were sent to Loyd and Cheryl Wesley, the director of human resources.

Loyd testified that he compared the cases of Gibson and Zimmerman with respect to their errors, explaining that although Zimmerman administered the medication at the wrong time, and Gibson failed to administer the medicine at all, they were similar because both were immediately terminable offenses on a first occurrence. Although technically true, according to the policy, Gibson's error, failing to give medication at all, permitted the consideration of extenuating circumstances, while Zimmerman's error did not so provide.

4. Discipline given to support specialists who committed medication errors

The General Counsel adduced evidence of other employees' medication administration errors and their treatment by the Respondent. Such cases relate to violations of the Respondent's policies, as follows:

> X. Medication Errors
>
> B. Failures of staff performance in medication administration will have the following consequences:
>
> 1. *Administration Errors*—For errors related to medication administration (including topical medications):
>
> a. Giving incorrect medication, e.g. one consumer's medication given to another consumer—termination.
>
> b. Failing to give medication to consumer at all without extenuating circumstances (e.g. staff simply fails

to give medication without emergency circumstances occurring which prevented the staff from being able to do so)—termination.

c. Incorrect dosage, including giving discontinued medication or giving medication at the wrong time.

1. Non-toxic dosage error, e.g.—medications, such as topical ointments, some prescription medications and over the counter medications, which would not result in serious consequences.

- First occurrence—written warning and retraining before allowed to administer again.
- Second occurrence—termination.

2. Toxic dosage, e.g.—medications, such as psychotropics that may result in serious injury or death.

- First occurrence—termination

C. In the event of a medication error that could result in termination of employment, the State Director—must present a report to the Medication Administration Review Committee. The MAR Committee will be comprised of the Chief Operating Officer, the Director of Human Resources, the State Director. The State Director will be charged with investigating the incident and presenting a summary of the event within 7 days to the MAR Committee along with his or her recommendations for personnel action. The Committee will determine what actions to take. Any member of the MAR Committee or the employee who has made the error can appeal the decision of the Committee to the President of SJCS.

Loyd testified that even though the policies set forth in X.B.1.a and c, above, require discipline without consideration of extenuating circumstances, nevertheless extenuating circumstances may be presented to the MAR Committee which could decide that the discipline set forth in the policy was not warranted because of extenuating circumstances. In addition, Peniston testified that it was his experience that support specialists were retrained "relatively frequently" instead of being discharged due to their medication administration errors.

The following are errors which required termination but did not result in termination:

1. Adrian Ferrington gave one consumer medication which was taken from another consumer's medication supply. The Respondent's policy, X.B.1.a, requires termination for "giving incorrect medication, e.g. one consumer's medication given to another consumer." In February, 2004, he was given a written warning signed by Schwartz. In addition, he administered only one tablet of medication to a consumer instead of the two tablets prescribed. Loyd testified that following those errors Ferrington remained employed by the Respondent, and was later promoted to the position of acting residential team leader whose responsibility is supervising the support specialists.

2. In March, 2004, Raphael Ekhelar gave one consumer's medication, Melaril, to another consumer who was not prescribed that medication. According to policy X.B.1.a., the discipline required is termination. However, he was given a final written warning and was retrained. The Disciplinary Action Form, in which he was given a final written warning, was signed by Peniston and Schwartz.

Program Coordinator Peniston stated that he and the program director believed, based on Ekhelar's explanation of what happened, that certain extenuating circumstances were present which excused Ekhelar from being discharged. It must be noted that policy X.B.1.a does not provide for the consideration of extenuating circumstances. Rather, termination is the action required for such an error.

On May 18, 2004, Ekhelar was terminated for another medication error – administering an incorrect dosage to a consumer. The discharge letter, signed by Peniston, noted that Ekhelar's first medication error was considered in terminating him.

Thus, Ferrington and Ekhelar both committed medication errors in violation of policy X.B.1.a, requiring termination. However, Ferrington received only a written warning, and was thereafter promoted to a supervisory position. Ekhelar was retrained and permitted to continue work because extenuating circumstances were presented, although that policy is silent as to the effect of extenuating circumstances on the determination of what discipline should be administered. The policy simply provides that termination is the discipline to be given to employees committing the medication error set forth in that policy.

3. On August 17, 2004, Stephanie Alexander failed to administer an anticonvulsive, psychotropic medication to a consumer in violation of X.B.1.b, which provides for termination except for the presence of extenuating circumstances. The Respondent apparently accepted her explanation that she lost her eyeglasses and had no checker as extenuating circumstances, and she received a final warning, was scheduled for retraining, and was prohibited from administering medication until she was retrained.

Thereafter, on September 28, 2004, while acting as a checker, Alexander did not notice that the staff specialist failed to administer medication to a consumer. She received a written warning which stated that future administration errors would lead to termination. The Respondent applies the same penalty to a checker who fails to notice an error as it does to a support specialist who does not administer the medication. Thus, Alexander should have been terminated pursuant to policy X.B.1.b. in the absence of extenuating circumstances. No extenuating circumstances were noted in the documents in evidence. Accordingly, she should have been terminated.

Three months later, on December 27, Alexander, working as a checker, again failed to notice that the staff specialist did not administer medication. She was terminated following that error. The termination letter signed by Schwartz noted that this was the third medication error Alexander committed between August and December, 2004. She was terminated under policy X.B.1.b. requiring termination if no extenuating circumstances exist.

4. On October 7, 2004, Frednel Fenelus failed to administer medications to two consumers in violation of policy X.B.1.b. which provides for termination with the consideration of extenuating circumstances, which were noted by Fenelus—he was distracted by the consumers while administering the medications and "accidentally forgot" to administer them. He was given a final written warning.

On November 29, 2004, Fenelus was terminated for administering the wrong medication to a consumer in violation of

X.B.1.a. which provides for termination, and is silent as to extenuating circumstances. Nevertheless, Program Director Schwartz's discharge letter noted that termination was appropriate since there were no extenuating circumstances and this was his second medication administration error. Actually it was his third since he previously failed to administer medication to two consumers. As set forth below, employee Hicks also failed to administer medication to two consumers and Schwartz noted that such misconduct was considered as two errors.

5. In October, 2004, Denise Hicks failed to administer medication in violation of policy X.B.1.b, which requires termination with the consideration of extenuating circumstances. In mitigation, she explained that the medication was not available and the pharmacy was closed. Supervisor Bovene White noted, however, that Hicks did not notify a supervisor, did not take the consumer to an emergency room to have the medications administered, and did not call the prescribing physician. Hicks replied that she administered the medication at the proper time, but simply failed to document the administration, which error she also blamed on her checker. Hicks received only a second written warning for that error.

As Loyd testified, Hicks' explanations were not accepted, and she presented no extenuating circumstances. Accordingly, she should have been terminated.

On December 28, 2004, Hicks committed two more errors in failing to administer seizure medication to two consumers. By letter dated January 18, 2005, Schwartz terminated her, noting that since she committed three medication errors they were "grounds for termination as per agency policy."

6. As set forth above, on November 14, 2004, supervisor Zimmerman directed a support specialist to take medication from one consumer's supply and administer it to another consumer. He was given a warning, whereas policy X.B.1.a. requires termination for this error. Two months later, he administered medication at the wrong time and was discharged.

7. On June 24, 2005, Delois Olive administered an incorrect dosage of Seroquel to a consumer, giving her a 100 mg. tablet instead of the prescribed 200 mg. tablet in violation of policy X.B.1.c. The Disciplinary Action Form signed by program director Schwartz noted that this was a "terminable offense," but that Olive would not be discharged because of the presence of extenuating circumstances because the day of the incident was the consumer's first morning in the residence, and Olive had no prior familiarity with her medication. The form, signed by Human Resources Director Wesley, noted that Olive was scheduled for retraining and was prohibited from administering medication until she was retrained. She was also warned that any further medication administration error would be grounds for further disciplinary action up to and including termination.

Pursuant to policy X.B.1.c, if Olive's error involved a non-toxic dosage and was a first occurrence, she would receive a written warning and retraining. A second occurrence would result in termination. If the dosage was toxic, a first occurrence would result in termination. Schwartz called her error "terminable," but did not discharge her because of the presence of extenuating circumstances. However, policy X.B.1.c. does not provide for the consideration of extenuating circumstances. In addition, if her error was indeed "terminable," it was either the second occurrence of the administration of a non-toxic dosage or the first occurrence of the administration of a toxic dosage. In either case, she should have been discharged pursuant to the policy.

Loyd testified that he was not specifically familiar with the facts of that case, he did not know if she had a medication administration error before this one, and did not know why Schwartz called it a terminable offense. Loyd decided to permit Olive to continue to work after this terminable offense because extenuating circumstances were presented. He stated that he contrasted this situation with Gibson's, in which no extenuating circumstances were presented. However, as noted above, policy X.B.1.c. is silent as to the effect of extenuating circumstances on the error. That policy does not provide for the consideration of extenuating circumstances in determining whether discipline should be imposed.

In contrast to the above, in April, 2005, Gibson was terminated for violating policy X.B.1.b, failing to administer a medication without extenuating circumstances. This was her first error and first discipline.

Analysis and Discussion

I. THE VIOLATION OF SECTION 8(A)(1) AND (3)

The complaint alleges that the Respondent unlawfully more strictly enforced its medication administration policy upon its employees, including Gibson, and discharged her pursuant to a stricter enforcement of its policy because of its employees' union activities. The evidence supports those allegations.

The General Counsel argues that prior to the Union's advent, the Respondent's medication error policy was not enforced to the letter of the policy, but that after the Union organized the Respondent's employees a change occurred pursuant to which that policy, in Gibson's case, was strictly enforced, resulting in her discharge.

Before I begin my analysis, it must be emphasized that I do not question the legitimacy of the Respondent's need to enforce its medication administration policy. The absolute importance that the Respondent attaches to its policy is not at issue. Similarly, the gravity of the harm to the consumer because of such an error is also not at issue. The issue here concerns how the Respondent dealt with its employees who committed medication errors.

As the Board stated in *Schrock Cabinet, Co*., 339 NLRB 182, 183–184 (2003), my finding that Gibson's discharge violated the Act:

> [d]oes not alter or undermine an employer's authority to implement or enforce work rules. Nor does it cast doubt on an employer's ability to *more strictly enforce* its work rules. (Emphasis in original) An employer's more stringent enforcement of its work rules will not constitute a violation of the Act unless it is a consequence of employee participation in protected activity. The existence of protected activity alone, however, does not foreclose an employer from more strictly enforcing its work rules, even where the employer previously tolerated infractions of those rules . . . . A violation of the Act will be found, however, where—as in this case—an employer

more strictly enforces a work rule in response to protected activity.

Pursuant to *Wright Line*, 251 NLRB 1083 (1980), the General Counsel has the burden of establishing that protected conduct was a motivating factor in the Respondent's decision to more strictly enforce its medication administration policy and discharge Gibson. To sustain his initial burden, the General Counsel must show that (1) the employees were engaged in protected concerted activity (2) the employer had knowledge of the activity and (3) the activity was a substantial or motivating reason for the employer's adverse action. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Once this is established, the burden shifts to the Respondent to demonstrate that its stricter enforcement of the policy and its termination of Gibson would have occurred for a legitimate reason regardless of the protected activities.

The testimonial and the documentary evidence support a finding that after the Union filed its petition to represent the support specialists, the Respondent more strictly adhered to its medication administration rules in processing disciplinary actions and terminations of employees.

Thus, on December 13, 2004, the Union filed a petition to represent the Respondent's employees. Immediately thereafter, according to Loyd, when he assumed the position of acting state director in January, 2005, the Respondent "really wanted to make sure that the policies were consistently implemented," inasmuch as prior to January, consistency in the enforcement of the medication administration policy was an "issue." Both Loyd and Peniston further testified that as a result of the Union's organizing efforts, the Respondent changed its policy by having its attorney review all disciplinary actions to ensure consistency and fairness in its actions, whereas this was not done before the Union's advent. Checking with its attorney does not violate the Act, but changing its policies in response to the Union's organizing effort does. The testimony of Peniston and Loyd is consistent with Gibson's, which I credit, in that she stated that Loyd told her that "with all this stuff with the union, everything goes through our lawyers now, and we have to go by the book" and "they have to do things different." It is significant that Gibson was terminated pursuant to a more strict enforcement of the policy less than 2 weeks after the Union was certified.

Thus, in direct response to the Union's organizing effort, in January, 2005, the Respondent admittedly changed its procedure for processing disciplinary cases and terminations by having its attorney examine the circumstances surrounding the error and be involved in the decision to terminate. This was in an admitted effort to enforce its policy more consistently—that is more strictly than had previously been the practice. As will be discussed below, there was no evidence that prior to the Union's advent any employee had been discharged for committing one medication administration error. Indeed, the evidence establishes that, prior to January, 2005, employees were warned but not terminated for first errors identical to the one that Gibson committed.

The question that must be answered is not whether Gibson committed an error, or even if it was a serious or terminable offense, but whether the Respondent would have discharged her even in the absence of its employees' union activities. Based on the evidence, I conclude that the Respondent's emphasis on consistent enforcement and application of the policy only occurred as a result of the unionization of the facility. Immediately thereafter, the policy began to be strictly implemented, and pursuant to that stricter enforcement, Gibson was discharged.

Thus, the General Counsel has proven that the Union's organizing of and representation of the Respondent's employees caused the Respondent to admittedly enforce its medication administration policy more consistently—in a stricter manner than it had before, and that stricter enforcement led to Gibson's discharge. The Respondent thus, according to Loyd's comment to Gibson, went "by the book" in applying its policy following its employees' interest in the Union.

A. Gibson's Discharge

1. Extenuating circumstances

I find that the Respondent's explanation for Gibson's discharge does not withstand scrutiny. First, if the typical procedure for the presentation of extenuating circumstances had been followed, her error would have been excused and she would not have been terminated. Second, even in the absence of the presentation of extenuating circumstances, other employees committing the same error but not having extenuating circumstances were not discharged, but received only warnings.

I credit Peniston's testimony that he was aware of Gibson's extenuating circumstances and believed that they would have excused her error and prevented her termination. Thus, Gibson told him of the conditions that she was faced with when alone with the four consumers which explained her failure to administer the medication—she was distracted in attempting to persuade a consumer to leave the bathroom so that others could use it—and they had just returned from out of home visits, conditions were "chaotic," and she had no checker. Those reasons were at least as compelling as other employees' accepted explanations for not administering medication: Fenelus was distracted and accidentally forgot, and Alexander lost her eyeglasses and had no checker.

The Respondent correctly argues that its decision makers were not aware that Gibson presented extenuating circumstances which would have permitted it to retain her. There are two reasons for this. First, Peniston was satisfied with Loyd's suggested discipline for her error—that she be prohibited from working as a support specialist, but would continue to work in the office. I must emphasize that Loyd testified that he suggested this solution to Peniston. Peniston therefore apparently did not see the need to inform Loyd of the existence of extenuating circumstances.

In this respect, I cannot credit Loyd's testimony that Peniston told him that there were no extenuating circumstances to Gibson's error. Loyd admitted that he suggested to Peniston that a fair resolution would be to terminate her from her support specialist position but retain her as an office assistant, and Peniston agreed. Accordingly, it was Loyd's belief going into the MAR Committee meeting that she would be retained and he had no need to inquire into her extenuating circumstances. However, at the committee meeting, he was overruled by the

other Committee members and attorney Hudson who decided to terminate her from both positions.

Secondly, if Peniston had been involved in the conference call with the Washington, D.C. headquarters personnel as a member of the MAR Committee as he had been before the change in procedure, he would have become aware that Gibson's termination was being considered. As he testified, that would have been the appropriate time to inform the decision-makers that Gibson raised valid extenuating circumstances. However, inasmuch as the Respondent changed its termination procedure because of the Union's representation of its employees and excluded Peniston from the deliberations, he did not have an opportunity to present Gibson's extenuating circumstances.

In addition, further evidence that Program Director Peniston was excluded from Gibson's termination process may be seen in the fact that he did not prepare or sign her termination letter. As set forth above, historically the program director prepared and signed the letter. Thus, in 2004 and in early 2005, Peniston and his successor Schwartz signed the termination letters of Ekhelar, Alexander, Fenelus, Zimmerman, and Hicks. In contrast, Gibson was terminated in April, 2005 by a letter signed by acting state director Loyd.

Accordingly, inasmuch as Peniston was excluded from the decision-making process pursuant to the Respondent's changed procedure following the Union's representation of its employees, he was precluded from raising the existence of extenuating circumstances during the conference call with Loyd, Wesley and attorney Hudson. Inasmuch as this changed procedure was put into place because of the Union's presence, Peniston's failure to mention Gibson's extenuating circumstances was caused by his exclusion from the MAR Committee conference call. I therefore find that Peniston's failure to raise Gibson's extenuating circumstances was justifiable, and brought about by the Respondent's change in its procedure in deciding the terminations of employees.

2. Evidence of stricter enforcement of the policy

Moreover, even in the absence of the presentation of Gibson's extenuating circumstances, the evidence establishes that other employees committing the same error but not having extenuating circumstances received only a warning, whereas Gibson was fired.

Gibson was discharged for failing to administer medication on April 4, 2005, her first error of any kind. Loyd stated that inasmuch as he was not aware of any extenuating circumstances which would excuse the error, termination was justified pursuant to the letter of the policy. However, there was evidence that two other employees committed the identical error with no extenuating circumstances but were retained.

Thus, as set forth above, Alexander failed to administer medication twice. Her first such error was excused because she presented extenuating circumstances. However, no evidence was offered that she presented extenuating circumstances as to her second error in September, 2004. Accordingly, she should have been terminated at that time. Nevertheless, she received only a written warning, and was permitted to continue working.

Similarly, Hicks failed to administer medication in October, 2004, and her excuses were not accepted as extenuating circumstances. She should have been terminated at that time, but she received only a second written warning and was permitted to continue working.

In addition, Alexander, Hicks, and Fenelus were discharged in 2004 only upon the commission of their third medication administration error. As set forth above, all the medication administration policies require termination upon the second error. In contrast, Gibson was discharged after her first such error, which was her first discipline of any kind. There was no evidence that any other employee had been discharged after his or her first medication administration error.

The only reason that Gibson was terminated for an offense for which Alexander and Hicks were only warned in 2004 was that Gibson's error occurred in 2005, at a time when the Respondent decided to more strictly enforce its medication administration policy because of the Union's representation of its employees. In addition, in 2004, Ferrington committed two medication administration errors at one time, each of which required termination, but not only was he retained, he was promoted to a supervisory position.

Loyd's effort at consistency in enforcing the policy is, first, an unlawful change in the terms and conditions of employment because it was instituted because of the Union's advent. Even if it was lawful, his application of Zimmerman's termination to Gibson's was inappropriate. Thus, Zimmerman was permitted to remain employed notwithstanding his first medication administration error in which he directed a staff specialist to take medication from one consumer's supply and administer it to another consumer. Policy X.B.1.a requires termination for this offense, and Loyd agreed that it was a terminable offense. In contrast, Gibson was terminated for her first error. Loyd stated that both cases were comparable since Zimmerman also held two positions and was discharged from both. However, he was terminated only following his second medication administration error. If Loyd wanted to be consistent in his treatment of Gibson and Zimmerman, he would have permitted Gibson to remain at work following her first error, as he did with Zimmerman.

The stricter enforcement of a policy in retaliation for employees' support for a union, which policy previously had not been uniformly enforced, violates Section 8(a)(1) of the Act. See *Treanor Moving & Storage Co*., 311 NLRB 371, 375 (1993), where the Board held that the announcement of a change in the enforcement of a policy to the effect that the respondent would more strictly apply its policy in retaliation against the employees' union activity violates the Act. "We used to let you guys get away with this kind of stuff. But now you are union and you guys are playing your game and the company is going to have to play by their game."

Disparate treatment may be found where an employer did not discharge an employee for a dischargeable offense while it discharged another employee for his violation of a rule. *Tracer Protection Services*, 328 NLRB 734, 735 (1999). Accordingly, the evidence set forth above establishes that the Respondent would not have discharged Gibson for only one error prior to the stricter enforcement of its policy in January, 2005.

In *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989), the Board found that prior to an election, the employer enforced its work rules in a "lax, sporadic, inconsistent" manner, finding a "stark contrast" between its preelection and postelection enforcement of its rules. Similar to the facts here, the Board noted that following the election, the employer fired employees for first-time violations, whereas in a 7-month period prior to the election, no employees were fired for violating the rules notwithstanding many did so, including repeat offenders.

In *Nursing Center at Vineland*, 314 NLRB 947, 950 (1994), prior to a union's organizing efforts, nurses smoked and ate at the nurses' stations. After a representation hearing, nurses heard that there was a "crackdown" on smoking at the facility. A supervisor was quoted as saying "with everything that's going on at the nursing home at this point in time, I have to enforce these rules even though they haven't been enforced in the past." In noting that the only thing going on at the nursing home at that time was the employees' union activity, the Board concluded that the supervisor was announcing a crackdown motivated by that activity and found a violation in the stricter enforcement of the no-smoking rule. Here, too, the Respondent made its policy more "consistent," and more strictly enforced it following the Union's advent.

In *Pontiac Care and Rehabilitation Center*, 344 NLRB 761, 766 (2005), a nurse was terminated for committing medication administration errors and failing to change a bandage. In finding a violation, the Board noted that a supervisor threatened that she would "have to do things by the book," thereby more strictly enforcing its rules and policies if employees chose a union. In holding that the nurse was terminated because of her union activity, the Board noted that she was treated disparately from other nurses who committed the same or more errors than she, but who were not known as union supporters. In the instant case, Loyd was quoted as saying in reference to considering Gibson's continued employment, that the Respondent now had to do things "by the book."

Wright Line is applicable where the employees' protected union activity in choosing a Union to represent them was a motivating factor in the Respondent's decision to strictly enforce its medication administration policy. The Respondent defends its action only by referring to the rule, which was not strictly enforced before the Union began organizing the employees. At most, the Respondent has shown that it *could* have discharged Gibson for her misconduct. It has not established that it *would* have discharged her in the absence of the employees' union activities. *Structural Composites Industries*, 304 NLRB 729, 730 (1991).

Thus, the Respondent has not demonstrated that it would have more strictly enforced its medication administration policy or discharged Gibson absent the employees' protected union activity. *Hialeah Hospital*, 343 NLRB 391 (2004). Therefore, the Respondent has not met its *Wright Line* burden of proving that it would have discharged Gibson even absent its employees' union activities. *KOFY-TV-20*, 332 NLRB 771, 772 (2000).

Even assuming that Gibson engaged in no union activities, the Respondent's unlawful stricter enforcement of its medication administration policy in response to its employees' union activities discriminated against all its employees. Thus, Gibson's discharge violated Section 8(a)(3) of the Act even if Gibson engaged in no union activities, and even if the Respondent had no particular unlawful motive against her. *Southern Mail, Inc*., 345 NLRB 644, 647 (2005). The issuance of discipline pursuant to stricter enforcement violates Section 8(a)(3) of the Act. *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987).

II. THE VIOLATION OF SECTION 8(A)(1) AND (5)

The complaint alleges that the Respondent unilaterally changed the enforcement of its medication administration policy without affording the Union an opportunity to bargain with it about that change.

Ann Luck, the Union's organizing director, testified that she was not notified by the Respondent of any changes to the enforcement of the medication administration policy, and the Union had no opportunity to bargain about that matter.

It is well established that is an unfair labor practice for an employer whose employees are represented by a union to make unilateral changes in the working conditions of its employees without first notifying the bargaining representative and giving it an opportunity to discuss the proposed changes. *NLRB v. Katz*, 369 U.S. 736 (1962). A new policy of strict enforcement of previously existing work rules is subject to the requirement of notice and bargaining just as much as is the promulgation of brand new work rules. "Although [certain rules] have been in effect since the Respondent commenced operations, that does not preclude our finding that the enforcement of those rules more stringently than had been the practice before the Union's election represented a change in the employees' terms and conditions of employment over which the Respondent had an obligation to bargain." *Hyatt Regency Memphis*, above at 263–264.

In addition, a mandatory subject of bargaining includes the circumstances in which discipline will be imposed for violations of the employer's rules. A change to the employer's disciplinary policy without bargaining or offering to bargain with the union that represents its employees violates Section 8(a)(5). *Southern Mail, Inc*., above, at 646.

Inasmuch as I find that the Respondent has more strictly enforced its medication administration policy and has not bargained with the Union about that change, I therefore conclude that it has violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. By more strictly enforcing its medication administration policy upon its employees, including Nia Gibson, the Respondent violated Section 8(a)(1) and (3) of the Act.
2. By discharging Nia Gibson because its employees joined or selected Communications Workers of America, Local 1037, AFL–CIO (Union), the Respondent violated Section 8(a)(1) and (3) of the Act.
3. By unilaterally changing the enforcement of its medication administration policy by more strictly enforcing its provisions without affording the Union an opportunity to bargain with it, the Respondent violated Section 8(a)(1) and (5) of the Act.

REMEDY

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.

The Respondent having discriminatorily discharged Nia Gibson, it must offer her reinstatement to her positions as substitute support specialist and administrative assistant, and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also order that the Respondent restore the status quo ante by revoking its new policy of stricter enforcement of its medication administration policy.

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

ORDER

The Respondent, St. John's Community Services–New Jersey, Hamilton, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Communications Workers of America, Local 1037, AFL–CIO (Union) as the exclusive bargaining representative of employees in the below-described appropriate unit by making unilateral changes in their terms and conditions of employment which are mandatory subjects of bargaining, without first giving adequate prior notice thereof to the Union and giving the Union a meaningful opportunity to bargain on such changes, including more strictly enforcing its medication administration policy:

> All full-time and regular part-time support specialists and substitute support specialists employed by the Employer at its 10 New Jersey locations located in Lawrenceville, Roselle, South Plainfield, Orange, Farmingdale, Long Branch, Rahway, Cedar Grove, Brick Township and Trenton, New Jersey, but excluding all office clerical employees, managerial employees, professional employees, guards and supervisors (including team leaders) as defined in the Act.

(b) Discharging or otherwise discriminating against any employee because its employees joined or selected the Union, or any other union.

(c) More strictly enforcing its medication administration policy upon its employees because they joined, selected or supported the Union.

(d) Unilaterally changing the enforcement of its medication administration policy by more strictly enforcing its provisions without affording the Union an opportunity to bargain with it over the terms and conditions of employment for its employees in the appropriate bargaining unit set forth above.

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

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

(a) On request by the Union, rescind the unilateral changes consisting of a more strict enforcement of its medication administration policy until such time as it negotiates with the Union in good faith to impasse or agreement.

(b) Within 14 days from the date of the Board's Order, offer Nia Gibson full reinstatement to her former positions as substitute support specialist and administrative assistant or, if those positions no longer exist, to substantially equivalent positions, without prejudice to her seniority or any other rights or privileges previously enjoyed.

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

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

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Hamilton, New Jersey, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 22, 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 April 11, 2005.

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

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

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."