NCRNC, LLC d/b/a Northeast Center for Rehabilitation and Brain Injury *and* 1199 SEIU United Healthcare Workers East and Tara Golden. Cases 03–CA–252090, 03–CA–254186, and 03–CA–255155

December 16, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND PROUTY

On April 21, 2021, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions[1] and a supporting brief, the Acting General Counsel and Charging Party Tara Golden each 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.[2]

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,[3] and conclusions only to the extent consistent with this Decision and Order.[4]

As discussed below, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging licensed practical nurse (LPN) Cathy Todd because of her union activities.[5] We also

[1] No party has excepted to the judge's finding that Unit Manager Tara Golden is a supervisor within the meaning of Sec. 2(11) of the National Labor Relations Act or to his dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by instructing supervisors to interrogate employees about their union support, threatening to report employee Cathy Todd to the New York State Department of Health, and making coercive statements to Golden. Further, no party has excepted to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) by suspending Golden for allegedly texting employees in support of the Union.

[2] Member Wilcox did not participate in the consideration of this case.

[3] 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.

For the reasons set forth in his decision, we affirm the judge's findings that the Respondent violated Sec. 8(a)(1) by implicitly threatening to report employee Kelly Leonard to the state nursing authority because she engaged in union activity and by posting a memo blaming the Union for the Respondent's decision to freeze wages.

We find it unnecessary to rely on the adverse inference drawn by the judge from the Respondent's failure to call human resources representative Andrew Bennett, inasmuch as there is a dispute whether he was employed by the Respondent at the time of the hearing, and we would reach the same result with respect to the violations found herein even absent that adverse inference. We otherwise find that the judge permissibly drew adverse inferences from the Respondent's failure to call certain witnesses or to elicit testimony regarding particular matters from witnesses that it did call. Contrary to the Respondent, the judge was not required to advise it that he was considering drawing adverse inferences before doing so. See *Douglas Aircraft Co.*, 308 NLRB 1217, 1217 fn. 1 (1992). Although the Respondent also claims that Maintenance Director John Walters no longer worked for the Respondent at the time of the hearing, we find that the judge appropriately drew an adverse inference as to him. Whereas the Respondent asserted, in its answer to the complaint, that Bennett "was a human resources representative from December 5, 2017 to February 7, 2020," it stated that "Walters has been the head of maintenance from August 31, 2015 to present," and nothing in the record indicates that Walters was no longer employed by the Respondent at the time of the hearing.

[4] We have amended the judge's conclusions of law consistent with our findings herein. We have also amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein, to conform to the Board's standard remedial language, and in accordance with our decisions in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall also compensate employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful suspension and discharges, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall substitute a new notice to conform to the Order as modified. Member Ring would require the Respondent to compensate LPN Cathy Todd for other pecuniary harms only insofar as the losses were directly caused by her unlawful suspension or discharge or indirectly caused by those unlawful actions where the causal link between the loss and the unfair labor practice is sufficiently clear, consistent with his partial dissent in *Thryv, Inc.*, supra, slip op. at 16–21. For the reasons stated in his partial dissent, Member Ring disagrees with his colleagues that the discharges of Unit Manager Tara Golden and Community Support Services Supervisor Josh Endy violated the Act.

[5] Todd was known to the Respondent as an active Union supporter. The judge found, and we agree, that the Respondent initiated an investigation of Todd's alleged mistreatment of patients in response to her union activities. The Respondent's claims that she mistreated patients, if true, would certainly furnish ample grounds for discharge. But the judge did not credit the Respondent that Todd had mistreated patients in the egregious manner it claimed, noting, among other things, that Todd had been employed by the Respondent for 12 years and had never been disciplined, that her most recent performance review—just 5 months before her suspension and discharge—said nothing about mistreatment of patients, and that the accusations that she mistreated patients postdated her union activity. The judge further observed that although the Respondent claimed that Todd's conduct was "horrible," it did not report her to the New York State Department of Health, as it would have been required to do had its claims about her been accurate. Despite the fact that the judge's findings indicate that the Respondent's claims were pretextual, at least in part, the judge applied the dual-motive test under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and concluded that the Respondent failed to prove that it would have discharged Todd for allegedly mistreating patients even absent her union activities. As

affirm the judge's finding that the Respondent violated Section 8(a)(1) by discharging Unit Manager Tara Golden, a statutory supervisor, for refusing to commit an unfair labor practice and by unlawfully surveilling employees, as well as by creating the impression that employees' union activities were under surveillance. However, for the reasons stated below, we reverse the judge's finding that the Respondent violated Section 8(a)(1) by instructing managers to surveil employees. We affirm the judge's finding that Community Support Services (CSS) Supervisor Josh Endy was a statutory employee and so affirm the findings that the Respondent violated Section 8(a)(1) by threatening and coercively interrogating Endy and violated Section 8(a)(3) and (1) by suspending and discharging him.

I. THE DISCHARGE OF TARA GOLDEN

A. Facts

The Respondent operates a long-term care facility serving patients recovering from brain injuries. Its approximately 415 employees work in five departments: Community Support Services (CSS), dietary, nursing, rehabilitation, and therapeutic services. Each department is organized into smaller units. From August 2018 until her November 20, 2019[6] discharge, Tara Golden was unit manager of the neurobehavioral intensive stabilization and rehabilitation program unit (NBI) in the nursing department. Golden reported to Director of Nursing Carolyn Carchidi, who reported to Administrator Patrick Weir, the highest-ranking official at the facility. Weir reported to Dave Camerota, the chief operating officer of the Respondent's parent corporation.

On July 5, Weir emailed Camerota that Unit Managers in the nursing department had overheard employees "talking about [u]nions" while at the facility. In a series of emails sent over the following weeks, Camerota stressed the "need to get ahead of the union talk," the "need to be speaking with staff to see where they are in the 'union talk,'" and the "imperative related to union avoidance" and "addressing their concerns." On July 29, outside consultants arrived to assist the Respondent in responding to the union activities at the facility. The consultants, led by Keith Peraino, stayed for eight days and met with managers and supervisors during their visit. Thereafter, they returned to the facility sporadically for the next few months and met with employees.

On October 28, the Union filed a representation petition seeking to represent a unit of "[a]ll full-time and regular part-time, including per diem, non-professional employees employed by the Employer."[7] In the early afternoon, Golden was summoned to a meeting with Camerota, Peraino, and the other consultants. Camerota accused Golden of sending a text message to the CSS workers, informing them that they all might be terminated because of union activity. Golden denied sending such a text. Later that afternoon, Weir told Golden that she was suspended pending an investigation of her alleged "unionizing" and the text message that was sent to the CSS employees.[8] Two days later, Golden was recalled from suspension. At that time, Weir told her that he was glad she was back, that she had potential, and that she was trying to become a better supervisor. He stated that he was worried she would have been so angry she would have quit. Weir also told Golden she was an integral part of the facility, that the NBI staff were saying good things about her, and that she was doing a really good job.[9]

After October 28, the consultants returned to the facility on a consistent basis for about four weeks. During this period, they held daily morning and afternoon group meetings and one-on-one meetings with unit managers.[10] In the morning meetings the consultants gave the managers handouts related to unionization, directing the managers to provide the handouts to employees and to discuss the information with them. At afternoon meetings, the consultants asked the managers to give feedback on how employees had responded to the handouts—thrown them away without reading them and shown or not shown an interest—in order to get an idea of their reactions. The consultants asked managers their impressions regarding employees' perspectives on the Union.

At the consultants' recommendation, Weir implemented a program to make management be more visible to employees. The judge credited Golden's testimony that, at a November 4 meeting, Camerota and Peraino request-

the judge correctly stated, to sustain its defense burden, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the employee's protected activity. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007). We see no basis for rejecting the judge's finding that the Respondent did not sustain this burden, and we affirm his conclusion that the Respondent's suspension and discharge of Todd violated Sec. 8(a)(3) and (1) of the Act.

[6] Dates are in 2019 unless otherwise noted.

[7] The Union withdrew the petition on October 30. The Respondent subsequently filed an RM petition, which the Regional Director dismissed. The Board denied the Respondent's petition for review on February 5, 2020.

[8] No evidence that an investigation occurred was produced at the hearing.

[9] She credibly testified that Weir said she "was doing wonderful things on NBI and he was just glad that I didn't quit and that I came back."

[10] The Respondent's unit managers, including Golden, are statutory supervisors.

ed that managers

> … come in on their off shifts and monitor the staff or ask them if they needed any assistance. But you didn't have to give any assistance. You just were looking for any suspicious activities. You were looking to see if anybody was gathering in groups. We were looking to see if—when we walked by, if they stopped speaking or if they continued speaking. … And they asked us to hand out literature and talk with the staff about the literature.

Later that afternoon, Camerota told Golden that she should not ask them whether they supported the Union, but should report information such as employees' body language, their eye contact while she was talking with them, whether particular employees crumpled up the consultants' literature, and if the employees spoke to anyone after she spoke with them about the literature.[11]

Several managers carried out these instructions, and employees noticed the unusual visits. LPN Kelly Leonard credibly testified that from late October to her resignation in January 2020, two or three department heads or unit managers came to the facility each night between nine and ten p.m., walking through the unit to "either talk to us and ask us if we needed anything or just walk through." She testified that it was "really odd because the people that came in at that hour are normally people that work dayshift, and they were department heads." Among the managers who visited the facility during off-hours were the heads of maintenance, housekeeping, dietary services, and respiratory services. As Leonard explained, "I don't really understand what they were going to do to help me . . . They couldn't help pass meds, they couldn't do treatments, and they couldn't do patient care." Leonard could not recall any prior occasions when a department head or unit manager from other units came into her unit and offered to provide assistance.

However, Golden objected to the Respondent's instructions to surveil employees. During the week of November 11, in a meeting with Carchidi and Carhart, Golden stated that "people" who did not belong on the units were coming and talking to staff about the Union when they did not need to be there.[12] She said that it was "a witch hunt and it was ridiculous, and that people that they had for the Union were not for the Union. And that . . . there was hostility in the building." Carhart told her not to use the words "witch hunt," stating that the Company was just trying to figure out who was for the Union and who was not. Carhart then asserted that Golden had been seen handing out union cards, to which Golden responded that she had never seen a union card or had contact with the Union. Carhart asked how Golden could prove that she was not in with the Union; Golden replied she did not know. Golden then informed Carchidi and Carhart that she was not willing to come in when she was off duty or go to other units to monitor the staff.

On November 20, Golden was called to Weir's office. Weir told Golden that, because she was no longer "a good fit" and that she did not seem to be able to make the transition into a management role, she was being relieved from her post. Golden asked what she had done wrong and what she could work on from a managerial standpoint. He repeated that it was just not a good fit, the Company was going in a different direction, and she was no longer employed.[13]

B. Analysis

We agree with the judge that the Respondent unlawfully discharged Golden for refusing the Respondent's direction to go to the facility on her off hours for the purpose of obtaining information regarding employees' support for the Union.[14] Although an employer may observe open union activity on or near its property, "an employer may not do something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities." *Sprain Brook Manor Nursing Home,* 351 NLRB 1190, 1190–1191 (2007), citing *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003). In *Sprain Brook Manor*, the Board found that a manager engaged in unlawful surveillance when she went to the workplace on a Saturday, when she normally did not work, solely because she thought there might be organizing activity and stood at an exit door where she could be seen observing a union meeting. The Board found that her actions were "out of the ordinary," specifically "because she did not ordinarily work on Saturdays," and

[11] The consultants remained at the facility through November. In addition to the twice daily meetings with managers, the consultants held meetings with employees designed to separate employees with "soft support" for the Union from those with "hard-core support." Peraino testified that the assessments of union support were based on "whatever the managers thought and whatever we would read on body language or whatever it might be."

[12] By "people," Golden was referring to directors and unit managers. She explained that because the patients on her unit are more easily agitated, stimuli are kept low, and the policy is that only persons assigned to the unit should be there.

[13] We note that Weir and Carchidi had unlawfully discharged LPN Todd the previous day.

[14] Although we agree with the judge that the Respondent's discharge of Golden for refusing to engage in surveillance violated Sec. 8(a)(1), we dismiss his additional finding that it violated Sec. 8(a)(3), which is not implicated by a supervisor's discharge. See, e.g., *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 402–404 (1982), enfd. sub nom. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). We also do not rely on the judge's citation to *Texas Dental Assn.*, 354 NLRB 398 (2009), a case decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

that, based on the unusual timing, her surveillance was unlawful.[15] Id. at 1190–1191; see also *Durham School Services*, 361 NLRB 407, 407 (2014) (finding unlawful surveillance where manager observed employee union activity in a way that was "out of the ordinary," because she had "atypically positioned herself in front of the facility" where she could observe the union activity, rather in the rear "where she normally was stationed").

Applying those principles here, we find that the Respondent's instructions to managers to visit the facility on their off hours to observe and interact with staff for the purpose of eliciting responses that would expose their views of the Union constituted instructions to engage in "out of the ordinary" surveillance.[16] Managers, including Golden, were directed not only to go into the workplace to seek evidence of union activity on their off hours, as in *Sprain Brook*, but also to go into areas where they did not ordinarily work, as in *Durham*. The Respondent directed the managers to engage the staff in ways designed to elicit reactions that would reveal their views of the Union, including nonverbal cues such as body language and eye contact, notwithstanding that employees may have chosen not to be open about their views. For example, the Respondent directed managers to offer employees handouts for the purpose of eliciting and watching their responses for evidence of union sentiment. Similarly, managers were directed to ask employees whether they needed assistance without any intent of actually providing assistance but, rather, solely to observe employees' reactions as an attempt to gauge "suspicious" activity.

We reject our dissenting colleague's suggestion that the Respondent merely told the managers to observe and offer help to the staff during these out-of-the-ordinary visits to the workplace, and his view that visits to a workplace at off-hours to observe open union activity cannot be considered unlawful. Simply put, that position is not supported by the record or by the Board's case law. As we have explained above, the purpose of these out-of-the-ordinary visits was to have managers glean information about who was and who was not for the Union by interacting with staff, including in ways that would reasonably cause them to reveal clues about their Union support. The Respondent's purpose, therefore, went well beyond making innocuous offers of help or observing open activity on its property. Rather, it was intended to monitor—and, indeed, ferret out—union activity and union support among employees that, in the ordinary course, would have remained unknown to the Respondent. This case, then, stands in clear contrast to cases where the Board has found that employer actions did not cross the line into unlawful surveillance.[17]

Our colleague also contends that an employer has a right to go into its workplace at any time, and our decision here improperly infringes on that right. But that right is not unlimited: when the employer takes out-of-the-ordinary actions to monitor employees in an attempt to detect union activity or union support, the monitoring constitutes unlawful surveillance.[18]

The distinction between *Sprain Brook Manor* and *Intertape Polymer Corp. v. NLRB*, 801 F.3d 224 (4th Cir. 2015), on which our colleague relies, is instructive. In *Intertape Polymer*, the respondent's supervisors had begun leafletting outside its facility *before* union supporters arrived to also engage in leafletting. The supervisors continued their leafletting in the subsequent days and

[15] Contrary to our dissenting colleague, the Board in *Sprain Brook Manor* specifically found that the off-hours timing of the manager's visit to the facility made her conduct "out of the ordinary." It was solely the off-hours timing of her surveillance that distinguished it from lawful observations of open union activity. We are not persuaded by our colleague's effort to distinguish *Sprain Brook Manor*. There, the supervisor admitted she was at the facility at an unusual time specifically to observe union activity. Likewise, here the managers were at the facility during their off-hours specifically to interact with staff after the start of the Union's campaign, to observe their activities, and to take those observations back to the Respondent's union-avoidance consultants. In both cases, as the Board recognized in *Sprain Brook Manor*, "[u]nder these circumstances [the supervisor's] conduct was 'out of the ordinary' and constituted unlawful surveillance." *Sprain Brook Manor*, supra, 351 NLRB at 1191.

[16] As discussed below, however, the instruction from a manager to a supervisor to engage in unlawful activity is not in itself unlawful.

[17] See, e.g., *Aladdin Gaming*, 345 NLRB 585, 585, 586 (2005) (finding no violation where managers approached and spoke with union organizers and employees openly distributing union cards in a cafeteria frequented by both management and employees, but explaining that an employer *does* violate the Act when it surveils employees engaged in Section 7 activity by observing them in a way that is "out of the ordinary" and thereby coercive); *Metal Industries*, 251 NLRB 1523, 1523 (1980) (no surveillance when management officials regularly stationed themselves in the parking lot at the end of the day to say goodbye to employees and had done so long before Union activity started; even though a vice-president appeared in the area with a clipboard, he had done so regularly in the past and the only change was that he stood further away from employees than usual).

[18] See, e.g., *Fieldcrest Cannon*, 318 NLRB 470, 502–504 (1995) (manager who went to the employee smoking area more frequently and spent more time on the floor than he had done before the union campaign started, and who knew employees discussed the union, was unlawfully surveilling; manager's behavior was "highly atypical," and all of the employees monitored were union supporters); *K-Mart Corp.*, 255 NLRB 922, 923–924 (1981) (employer engaged in surveillance when, shortly after learning of the union campaign, it began following employees who supported the union as they moved around the store and such shadowing was out of the ordinary).

Our dissenting colleague also cites numerous legal principles related to lawful antiunion campaigns. However, those situations are not present here and those principles are not implicated by our decision.

were able to observe union activity. The court found no unlawful surveillance in significant part because the supervisors "did not go to a place where union supporters or other employees were engaged in union activities for the purpose of 'spying upon' them." Id. at 240. The court explained that "not every 'out of the ordinary' activity by an employer can be deemed, a *fortiori,* coercive. . . . On the contrary, *the cases have always considered the employer's reason for being in a particular place at a particular time*." Id. at 239 (emphasis added). Here, the reason the managers were instructed to visit the facility at out-of-the-ordinary times was to uncover evidence about union support, not by passive observation, but by strategically interacting with and monitoring reactions of the staff.

Having determined that the Respondent's instructions to its managers constituted instructions to engage in unlawful surveillance, we further adopt the judge's finding, for the reasons he stated, that Golden was fired for her objections to the Respondent's monitoring program and express refusal to go into to the facility on her off hours to engage in unlawful surveillance. In so finding, we agree with the judge that the Respondent's justifications for the discharge were pretextual. Golden had no history of performance deficiencies or workplace conflict. To the contrary, on October 31 Weir told Golden that the NBI staff was saying good things about her and that she was doing a really good job. Yet on November 20, he fired her, he told her that she was not a "good fit" and that the Company was going in a different direction. At the hearing Weir testified that he observed Golden "struggle" as a unit manager and that he received "a lot" of complaints from staff regarding how she was managing NBI, directly contradicting his October 31 statement. But nothing in the record indicates that Golden's performance or interaction with staff changed between October 31 and November 20. Moreover, as the judge found, the Director of Nursing (to whom Golden reported) played no role in the decision to discharge her as would be expected in a case of performance problems, and Golden had never been disciplined for her performance as a unit manager. The note Weir placed in Golden's file states that she was terminated for her inability to transition to her management role and for creating conflict between staff and management. We agree with the judge that this could not have referred to anything other than her refusal to go to the workplace during off hours to surveil employees, as nothing else in the record reflects a conflict around Golden.

The Respondent contends that she would have been fired irrespective of the refusal because she was dividing the staff on her unit, because she was unable to grow into her new supervisory role, and because she was interrogating employees about their union views or at least giving the Respondent that impression. The judge did not credit testimony proffered to support this contention. We find no reason to reverse his fact and credibility determinations. For the above reasons, we affirm the judge's finding that the Respondent unlawfully fired Golden specifically for her refusal to follow the Respondent's direction to engage in "out of the ordinary" surveillance of employees and that the Respondent failed to establish that it would have fired Golden even absent that refusal.

Our dissenting colleague rejects the arguments that the Respondent has presented to the Board explaining its rationale for discharging Golden, instead substituting his own hypothetical rationale for the discharge. In his view, the Respondent discharged Golden for her "overall unwillingness" to participate in the Respondent's antiunion campaign and because it "reasonably believed" that Golden supported the Union. The Respondent, however, does not itself cite this rationale for its decision to discharge Golden; rather, it asserts that it terminated Golden because of her failure to transition to her role as a manager. The Respondent does not contend that Golden's failure to participate in the antiunion campaign was the gravamen of her failure as a manager; rather, it Respondent asserts that Golden's problems with transitioning to her new role started earlier, at the time she was promoted to unit manager and were reflected in her communications with staff. Our colleague's asserted reason for the discharge is not what the Respondent contends in its exceptions, and thus we do not rely on it.[19]

[19] Our dissenting colleague says that, drawing reasonable inferences from the record, he merely finds that the General Counsel did not meet her burden to show the Respondent had an unlawful motive in discharging Golden. In our view, however, our colleague impermissibly offers justifications for the Respondent's actions that the Respondent itself does not assert. We also reject our colleague's claim that there is no contradiction between his conclusion that Golden was lawfully discharged because the Respondent thought she supported the Union and the Respondent's statement that she was discharged because she failed to transition to her role as a manager. The Respondent does not assert that Golden was discharged because she did not support the Respondent's anti-union position, or that part of being a manager was supporting the Respondent's campaign. Yet our colleague contends that is what the Respondent must have meant when it said Golden failed to transition to a managerial role. We decline to make such an inference.

We find it necessary to correct inaccuracies in our colleague's characterization of the record. First, there is no testimony that the Respondent fired Golden for her "unwillingness" to participate in the campaign or because it thought she supported the Union. Weir, who discharged her, did not say this—not in his testimony, not to Golden, and not in his note to her file. Nor did any other witness. On the contrary, Golden fully participated in the campaign until November 11 when she refused to go into the workplace on her off hours to engage in unlawful monitoring of the staff. Otherwise, Golden had willingly engaged in lawful activity in support of the Respondent's campaign.

For the reasons set forth above, we conclude that the Respondent violated Section 8(a)(1) by discharging Golden for her refusal to engage in unlawful surveillance.

II. IMPRESSION OF SURVEILLANCE, SURVEILLANCE, AND INSTRUCTION TO SURVEIL

1. Impression of surveillance

On November 12, approximately two weeks after the election petition was filed, employee Leonard was called into a meeting with several managers, including Maintenance Director John Walters, and the Respondent's management consultants. Consultant Keith Peraino accused Leonard of harassing housekeepers in the course of her union activities and "forcing" the union on them, with both Walters and Peraino asserting that the Respondent had Leonard on video. Although the General Counsel subpoenaed this video, the Respondent never produced it.

The judge found that the Respondent violated the Act by creating the impression of surveillance. In so finding—and as with his additional findings that the Respondent unlawfully engaged in surveillance and instructed supervisors to surveil the staff—the judge did not clearly identify which facts established which violations. However, paragraph 6(g) of the complaint, which the judge set forth in his decision, specifically alleged that the November 12 statement to Leonard unlawfully created an impression that her union activities were under surveillance. Although the complaint additionally alleged that statements made to Tara Golden on October 28 created the impression of surveillance, the judge dismissed that allegation based on his finding that she was a statutory supervisor. We thus construe the judge's decision to have found an impression-of-surveillance violation based on the Respondent's November 12 statements to Leonard that it had her union activity on video, and we affirm that finding.[20]

2. Surveillance

We adopt the judge's finding that the Respondent unlawfully surveilled employees when its managers and supervisors came to the facility at out-of-the-ordinary hours and walked about the floor, observing and offering to help employees.[21] "The Board has often held that management officials may observe public union activity, particularly when such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary." *Arrow Automotive*, 258 NLRB 860–861 (1981). When officials *do* depart from their ordinary conduct, such atypical monitoring "clearly has an inhibiting effect upon employees' union activity and is violative of Section 8(a)(1)

She did not object to distributing antiunion materials to employees at the facility, nor did she fail to carry out a directive to report activities that she saw while engaging in her normal duties as a unit manager. During the week of November 4, Camerota criticized her questioning of and reporting about the staff and gave her new directions. Golden subsequently followed his instructions and reported on staff as he directed. Camerota then *approved* of the way she was reporting. Our colleague reads unstated meaning into Golden's testimony about this exchange. Whatever Camerota believed, he was not called to testify, for which the judge reasonably drew an adverse inference.

Second, the record does not support our colleague's assertion that the Respondent "reasonably believed" that Golden supported the Union and fired her for it. Our colleague says that "the judge found that the Respondent lawfully suspended [Golden] on October 28 because it believed that she supported the Union." The judge found the suspension lawful only because Golden was a supervisor. He did not make a finding about the Respondent's belief or its reasonableness. The Respondent had suspended Golden purportedly to investigate whether she had texted a warning to the CSS employees after the Respondent said it was prepared to fire them all for bringing in the Union. No evidence substantiating this belief was put in the record. Significantly, Weir (who fired her for different reasons) told Golden that he and Carhart did not believe she had sent the text. There is also no basis for our colleague to suggest that Golden's purported dismay at the unconscionable discharge threat is evidence that she supported the Union. Further, Golden did not refer to the antiunion campaign overall as a "witch hunt." She was specifically referring to the managers going into the workplace at out-of-the-ordinary times to surveil the staff. Our colleague also contends that the Respondent believed Golden was handing out Union cards. This is based solely on Golden's testimony that Carhart accused her of handing out union cards. Whether Carhart believed this or whether anyone had actually reported it to her is not in the record. There is no basis to draw any conclusion from Carhart's accusation, because the Respondent failed to call her to testify, and the judge reasonably drew an adverse inference, as he did for the failure to call Camerota. In any event, assuming arguendo Golden's refusal to surveil employees did make the Respondent suspect that she supported the Union, that is not why it says it fired her.

[20] See *Mek Arden, LLC d/b/a Arden Post Acute Rehab*, 365 NLRB No. 109, slip op. at 10, 18 (2017) (employer created impression of surveillance by telling employees that cameras were operational and recorded audio when, in fact, cameras were not operational), enfd. 755 Fed. Appx. 12 (D.C. Cir. 2018). Further, the Respondent does not contend, nor did it proffer evidence, that Leonard engaged in any harassment that would remove her union activities from the protection of the Act.

[21] We find no merit to the Respondent's argument that the judge denied the Respondent due process by finding an unalleged surveillance or impression-of-surveillance violation. "It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). As noted above, the November 12 conversation with Leonard was specifically alleged in the complaint to have created an impression of surveillance. Although the complaint did not allege that the Respondent unlawfully surveilled its employees' union activity through its efforts to increase management visibility, the facts that form the basis of this violation were fully litigated by the parties, and the issue is closely connected to the complaint's impression of surveillance allegations. Thus, both parts of the *Pergament* test are satisfied and the judge's finding of this violation did not deprive the Respondent of due process.

of the Act." *Intermedics*, *Inc.* 262 NLRB 1407, 1415 (1982).

The Board has found unlawful surveillance in cases like this one. For example, in *Intermedics, Inc.*, 262 NLRB 1407, 1410, 1415 (1982), the Board adopted a finding that the Respondent engaged in unlawful surveillance by, among other activities, standing outside the door of the quality control room watching employees. The managers had offices elsewhere, and employees testified they had never known them to come and spend the day in the plant walking around. Nor had they known managers to congregate in groups watching employees in the break room, instead of getting coffee and taking it back to their offices. This out of the ordinary activity "in a manner which was inconsistent with their customary daily routines" constituted surveillance.[22] See also *Parsippany Hotel*, 319 NLRB 114, 126 (1995); *Fieldcrest Cannon*, 318 NLRB 470, 502–504 (1995).

As discussed above in connection with the Respondent's unlawful discharge of Tara Golden, the Respondent here instructed supervisors and managers to come to the facility during their normal off-hours specifically to glean information about who was (and who was not) for the Union, by interacting with staff, including in ways that would reasonably cause employees to reveal, even unintentionally, clues about their union support. It is undisputed that managers then did so. That conduct had no legitimate business purpose unrelated to employees' Section 7 activity, and it had a reasonable tendency to chill employees from engaging in such activity, in violation of Section 8(a)(1). The conduct clearly was out of the ordinary for the Respondent: employee Kelly Leonard credibly testified that it was "really odd because the people that came in at that hour are normally people that work dayshift, and they were department heads." Leonard further testified that she could not recall managers coming in during off-hours in the past, and that their presence was strange because they could not help with the floor's work. The Respondent's aim, of course, was not to help employees, but rather to gain information about the union sentiments of its employees by observing their body language, reactions to leafletting, and their behavior during interactions with supervisors.[23] We find, therefore, that the Respondent engaged in unlawful surveillance.

We reject our dissenting colleague's contention that unlawful surveillance only exists if managers and supervisors actually witness union or protected activity. Our case law does not affirmatively support a requirement that supervisors observe protected activity before we will find that surveillance took place.[24] To the contrary, the Board has found unlawful surveillance where there is no indication that union or protected activity was observed. E.g., *Parsippany Hotel*, 319 NLRB 114, 126 (1995) (managers surveilled employees by following them while they were on a walk during break time and by observing them for three hours as they set up/served at a lunch function, without mention of whether the managers saw protected activity); *Fieldcrest Cannon*, 318 NLRB 470, 502–504 (finding a manager who went to the smoking area more frequently and spent more time on the floor than he had done before the union campaign engaged in unlawful surveillance, without analysis of whether he saw anything union-related).[25] Here, the supervisors

[22] We reject our dissenting colleague's conclusion that *Intermedics*, above, is distinguishable because, in his view, the supervisors there had "no ostensible purpose other than to observe protected activity." If that is so, then it is equally true here. As in this case, the supervisors in *Intermedics* came to the workplace at odd hours, walked around watching and spent the day with employees, and did so after the onset of union activity. The supervisors here were told to observe employees and report back to management at union-avoidance meetings. We find that they, too, had no ostensible purpose other than to try to observe employees and their protected activity. As we explain below, what they may or may not have seen is merely happenstance and does not change the purpose of the observation.

[23] Our dissenting colleague, invoking Section 8(c) of the Act, argues that finding a surveillance violation here improperly prevents an employer from engaging in "one-on-one persuasion" of employees by managers opposing unionization. When a manager is engaged in "one-on-one persuasion," our colleague asserts, he will inevitably observe the employee's reaction and this would amount to unlawful surveillance under today's decision – according to our colleague. We reject this characterization of our holding here, as well as the premise from which our colleague proceeds. As explained, the surveillance violation we find is based on the out-of-ordinary efforts made by the Respondent to discover the union activity and union sentiments of its employees, and it is entirely consistent with Board precedent. It is also entirely consistent with Board decisions finding that employers may not place employees in a position where they must make an "observable choice" between support for unionization and opposition to it. See, e.g. *A.O. Smith*, 315 NLRB 994, 994 (1994) (citing cases) The Board describes such violations of Section 8(a)(1) as the unlawful interrogation of employees, but the underlying principle is the same one that informs the Board's approach to surveillance violations under Section 8(a)(1): that in certain circumstances, an employer's observation of Section 7 activity by employees has a reasonable tendency to "interfere with, restrain, or coerce" employees in their exercise of statutory rights.

[24] Here, we find our dissenting colleague's citation to *Comar Glass*, 244 NLRB 379 (1979) unconvincing. While in that case the Board noted that the only activity observed was a walk across the street to buy soft drinks, this does not affirmatively establish that union or protected activity must be observed in order to find a surveillance violation. Indeed, as in the cases we have cited below, the Board has found surveillance even without reference to whether such activity was observed or not. In short, we conclude our colleague has not established that the observation of union or protected activity is an express element of a surveillance violation.

[25] See also, *Lyman Steel*, 249 NLRB 296, 302–303 (1980) (same); *Stoughton Trailers*, 234 NLRB 1203, 1205, 1207 (1978) (same). Accord *Trailmobile Trailer*, 343 NLRB 95, 96 (2004) (employer's installation of secret surveillance camera was unlawful surveillance, without

came to the facility during their off-hours, a time when it was out of the ordinary for them to appear on the floor, and walked around, interacting with employees with no demonstrated legitimate purpose. They acted on the Respondent's instructions to increase their presence on the floors and report their observations of employees to management at regular meetings.[26] Even assuming that the dissent is correct that they observed no obvious union activity, we conclude that absence of such activity was at best happenstance, or, equally likely, a reflection of the chilling effect of being monitored: employees are unlikely to willingly engage in open activity in front of their supervisors, especially when those supervisors suddenly appear at odd hours and in odd places.

We therefore adopt the judge's finding that the Respondent engaged in unlawful surveillance in violation of Section 8(a)(1) when its supervisors and managers engaged in the out-of-the-ordinary conduct of coming to the facility during their off hours to observe and interact with employees in order to determine their union sentiments.

3. Instruction to surveil

Although we find the Respondent engaged in unlawful surveillance, we reverse the judge's finding that the Respondent independently violated Section 8(a)(1) by instructing its supervisors to engage in that surveillance.

Citing *Resistance Technology, Inc.*, 280 NLRB 1004 (1986), enfd. mem. 830 F.2d 1188 (D.C. Cir. 1987), the judge found that, because supervisors acted on the Respondent's instruction to commit unlawful surveillance, the instruction itself constituted a separate violation of the Act. In *Resistance Technology*, the Board found that the employer violated the Act when a supervisor *disclosed to employees* that higher-level management had asked her to engage in unlawful interrogation. 280 NLRB at 1006 fn. 5. In so finding, the Board stated that

> [t]he mere issuance of instructions, even if to perform unlawful acts, to supervisors to find out the identity of union supporters and the union sympathies of employees cannot in itself interfere with, restrain, and coerce employees in the exercise of their statutory rights where those instructions are neither carried out nor disclosed to the employees.
>
> . . .

280 NLRB at 1006–1007. Relying on that language, the judge concluded that *Resistance Technology* holds that the issuance of instructions to surveil *would* itself interfere with employees' rights where the instructions either were carried out or were disclosed to the employees.

We reject the judge's interpretation of *Resistance Technology*. In *Resistance Technology*, the Board did *not* find the employer's instruction unlawful, although it had been disclosed to employees. Rather, the Board modified the judge's recommended order to remove a paragraph that would have required the respondent employer there to cease and desist from instructing its mangers to surveil employees. Id. at 1007, 1023.

Applying *Resistance Technology* as binding precedent, we reverse the judge's finding that the Respondent separately violated the Act by instructing supervisors to engage in surveillance and we dismiss this allegation.[27]

III. JOSH ENDY

A. Supervisory Status

a. Facts

The Respondent's CSS department is responsible for checking on and caring for residents, protecting safety, and signing residents in and out. Josh Endy is one of two night supervisors for the CSS department, and during the night shift, the nursing supervisor is the only other supervisor regularly in the building. Although Endy and the other CSS supervisor, Josie Cruz, considered Cruz to be the lead supervisor, Endy was scheduled to work at least two shifts per week without Cruz. Between seven and ten CSS employees worked the night shift, including

discussion of what it may or may not have captured on camera, when the employer failed to show it had a legitimate purpose for the installation; the appropriate "inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances."); *Hialeah Hosp.*, 343 NLRB 391, 393-394 (2004) (employer unlawfully surveilled known union supporter by installing a hidden camera in his workroom; although it claimed to have installed the camera due to concerns about employee's low productivity and possible sleeping on the job, evidence showed that the camera was installed to find a pretext for discharging him).

[26] We reject our dissenting colleague's benign characterization of the Respondent's instruction to supervisors, i.e., that they were to come in and to engage with employees while the employees were working their normal shifts, not to observe known union activity. The supervisors were not trying to engage with staff on a social level, or even observe their work performance, but rather to report their observations in management meetings, at times in the presence of the Respondent's union avoidance consultants.

[27] In the absence of a Board majority to overrule *Resistance Technology*, Chairman McFerran and Member Prouty apply that case here for institutional reasons. They note that *Resistance Technology* reversed prior caselaw that would have found an employer's instructions to its supervisors to engage in unlawful conduct was itself an unfair labor practice. See *Cannon Electric*, 151 NLRB 1465, 1468–1469 (1965). In their view, the principles in *Cannon Electric* bear considering and they would be open to reconsidering *Resistance Technology* in a future appropriate case.

Member Ring agrees that the instruction-to-surveil allegation must be dismissed even assuming the management-visibility program constituted unlawful surveillance. He believes, however, that it did not, for the reasons stated in his separate opinion.

Cruz and Endy.

One of the CSS supervisor's duties is to assign employees to a post each shift. The judge credited Cruz's testimony that this process would take 10 to 15 minutes if everyone scheduled to work reported for their shifts. It would take closer to 30 minutes if one or more employees were absent, which occurs frequently. After completing the assignment sheet, one of the supervisors would submit it to the nursing supervisor, who would review it. Completing the assignment sheet entailed assigning employees to the following posts: close visual observation (CVO) of a single resident, in either the neurobehavioral intensive stabilization and rehabilitation program unit (NBI)[28] or another unit; increased supervision (IS),[29] either in the NBI or another unit; therapeutic support;[30] break relief for employees assigned other posts; or monitoring the front desk. Endy would complete the assignment sheet whenever he was the only CSS supervisor or if Cruz was running late. If neither Cruz nor Endy was working, the nursing supervisor or the most senior CSS employee would make the assignments.

NBI posts are considered the most difficult, as violent or aggressive residents are housed there. Nevertheless, no special training was given to CSS employees with respect to different posts. In assigning employees to posts, Endy testified without contradiction that he considered employees' preferences, abilities, and relationships with particular residents, as well as the need to rotate more difficult assignments. Endy additionally testified that he would not assign a novice employee or a woman to work on the NBI unless they requested it.[31]

b. Analysis

Section 2(11) of the Act defines a "supervisor" as an individual holding the authority to engage in or effectively recommend any 1 of the 12 listed supervisory functions, provided the individual exercises independent judgment in doing so. "It is well established that the 'burden of proving supervisory status rests on the party asserting that such status exists.'" *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006) (quoting *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. Id.[32]

To "exercise 'independent judgment' an individual must at minimum act . . . free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 692–693. A judgment is not independent if "it is dictated or controlled by detailed instructions" or if there is "only one obvious and self-evident choice." Id. at 693. Nor is an assignment based on independent judgment if it is made based on nothing more than known skills that make the assigned employee capable of doing the job. See *G4S Government Solutions, Inc., d/b/a WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 3 (2016).

Here, there is no dispute that CSS supervisors "assign" employees to a post. The judge concluded that Endy did not, however, exercise independent judgment in doing so, finding that the assignments were routine in nature because "all CSS staff were capable of performing all posts, and none of them had any special training or education that made them uniquely qualified for any particular assignment."

We agree. While Endy considered the rotation of particularly difficult assignments and the distribution of work with more challenging patients, the very fact that these assignments *were* at various times distributed among different employees demonstrates that all staff could perform the work. Contrary to our dissenting colleague, we do not find that Endy exercised independent judgment: no objectively "wrong" choice could have been made. Although he may have kept novice employees away from the more difficult assignments, this seems not so much the exercise of independent judgment of skill and ability, but rather a practice based on an easily measurable metric (i.e., time in service). The same is true for keeping women away from those patients that might sexually assault them – it is a clear practice based on the basic fact that the employee is female. Similarly, taking note of employee preferences reflects just that – a preference, not a particularized ability to do a certain job.

In so doing, we distinguish this situation from that in *Oakwood*, above, finding independent judgment existed

[28] As we have noted above, the NBI houses patients who have behavioral problems that pose a risk of harm to themselves or others.

[29] IS entails performing checks on certain patients every 15 minutes. Tr. 196:9–13.

[30] Therapeutic support entails walking through the facility and offering assistance as needed. Tr. 773:6–12.

[31] For a short period of less than 2 months in late 2018, the CSS supervisors used a strict rotation system for making CSS assignments, but then they returned to their regular method of making assignments based on the multiple factors described above.

[32] In setting forth the legal standard for determining supervisory status, the judge relied on *Brusco Tug & Barge, Inc.*, 359 NLRB 486 (2012), which was rendered invalid by the Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014). We note, however, that a properly constituted Board reaffirmed and incorporated by reference the decision in *Brusco Tug & Barge*. See 362 NLRB 257 (2015). Additionally, we do not rely on the judge's citation to *Mercy General Health Partners Amicare Home Care*, which appears to be a regional director's decision of which review was not sought and therefore not precedential. See Case No. 07–RC–204105, 210 LRRM 1131, 2017–WL 6034114 (Oct. 12, 2017).

when a charge nurse assigned staff based on her "weigh[ing] the individualized condition and needs of a patient against the skills or special training of available nursing personnel. *Oakwood*, 348 NLRB 686, 693 (2006). Unlike that situation, here the record shows that Respondent has not met its burden to produce clear evidence of the requisite special skills or training for certain staff members as compared to others in performing particular tasks. While there may be differences in on-the-job experience between one employee and the next, there are not clear skill differences in training or abilities to perform the core functions of the job. See *Lynwood Manor*, 350 NLRB 489 (2007) (respondent produced little evidence regarding the factors considered and did not show that nurses make assignments tailored to patient conditions and nurse skill sets).

We disagree with our dissenting colleague that the 10 to 15 minutes that it ordinarily takes to make employee assignments means that those decisions are made using independent judgment. First, we note that time is not determinative; what matters, rather, is whether the assignment process is governed by fixed criteria. Here, while assignments are not made according to a manual, Endy nevertheless assigns employees who possess similar skills and qualifications. That he considers factors such as distribution of difficult assignments, gender, and the relative time in service of each employee necessarily will take some time, but the determinations do not rise to a level that would constitute independent judgment.

We find, therefore, that Endy is not a statutory supervisor within the meaning of Section 2(11) of the Act.[33]

B. Threat and Interrogation of Endy

Having found Endy is not a statutory supervisor, we proceed to consider the allegations that the Respondent threatened and interrogated him in violation of Section 8(a)(1). We agree with the judge that it did. The Board has long held that a respondent engages in coercive interrogation if, "under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights granted under the Act." *Rossmore House*, 269 NLRB 1176, 1177–1178, affd. 760 F.2d 1006 (9th Cir. 1985). Relevant factors include: the background; the nature of the information sought; the identity of the questioner; the place and method of the questioning; and the truthfulness of the employee's reply to the questioning. *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).

Here, the record shows that in a series of emails on November 11, Peraino, Camerota, and Rinn discussed Endy's status at the company, with Peraino stating "He is blatantly anti company and breaking every policy. Not a supervisor." Camerota replied, "If he is not following our philosophy, please feel free to relieve him of his duties today. Endy was summoned to a meeting with Peraino and CSS Director DeAbreu that evening. According to the credited testimony, Peraino asked Endy if he knew why he was there, to which Endy replied he did not. Peraino stated it was because of his union activity, that his handing out union authorization cards was illegal, and the company was going to sue him. Peraino continued asking questions, including whether Endy knew who else was handing out cards and why he wanted a union. Endy said he would not answer. DeAbreu then indicated Endy would be suspended pending an investigation. There is no evidence of a subsequent investigation by the Respondent. Endy was mailed a notice of termination dated November 27, but effective as of November 11.

Applying the totality of the circumstances test above, we find that Endy was called to a private conference in an administrative conference room with members of senior management. The nature of the information sought went directly to Endy's own union activities and those of his coworkers, including accusations of purportedly illegal conduct. In addition, Endy was informed he would be suspended because of the Respondent's accusations. We therefore find that the Respondent unlawfully interrogated Endy in violation of Section 8(a)(1) of the Act.

We further find, in agreement with the judge, that the Respondent's threat of a lawsuit constitutes a further, independent violation of Section 8(a)(1). When analyzing alleged threats, the Board asks, "whether the threat would reasonably tend to interfere with, restrain, or coerce an employee in the exercise of his Section 7 rights." *Network Dynamic Cabling*, 351 NLRB 1423, 1427 (2007). This test is an objective one, not based on subjective coerciveness. *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 3 (2021). The Board has long held that threatening to sue an employee for engaging in protected activity violates the Act. *S.E Nichols Marcy Corp.*, 229 NLRB 75, 75 (1977). The Respondent here did just that.

C. Suspension and Discharge of Endy

As noted above, Endy was told he was suspended during the November 11 meeting with Peraino and DeAbreu, and he was discharged by letter dated November 27 but effective as of November 11. We agree with the judge, for the reasons he stated, that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending

[33] In so finding, we do not rely on the judge's citation to *Azusa Ranch Market*, 321 NLRB 811, 812 (1996), which was decided pre-*Oakwood*. We agree with the judge that no other basis exists to find supervisory status.

and discharging Endy.

The credited testimony shows that, after the events described above, the managers told Endy that he was suspended pending an investigation. However, Endy became upset and threw his badge on the table, pulled the door open hard enough to cause a dent in the wall and break a trash can. We agree with the judge that the General Counsel has established a prima facie case under the Board's *Wright Line* analysis.[34] The Respondent knew Endy was a Union supporter, displayed animus toward that protected activity by its threats and interrogation earlier in the meeting, and discharged Endy. We further find that the Respondent failed to meet its burden to show it would have suspended and discharged Endy absent his protected activity. *Key Food*, 336 NLRB 111, 111–112 (2001). First, any work-related concerns conveyed in the emails between members of management earlier on November 11 were not mentioned at the meeting later that day and were not included as reasons for discharge in the termination documents.[35] Second, we note that there is no evidence that the Respondent conducted an investigation after the meeting, despite its statements that Endy would be suspended pending an investigation. Finally, we note that Endy was never disciplined for the purported performance concerns and there is no evidence of progressive discipline in the record

The Respondent presented no evidence that it would have discharged Endy absent his union activity.[36] The judge discredited the Respondent's claim that Endy threw his badge at Peraino and DeAbreu and found that, at most, Endy threw his badge on the table. We find no basis for reversing his credibility determination. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). The judge further found that Endy slammed a door when he left the meeting, causing a small dent. We agree that, in the context of Peraino's accusatory and coercive statements, this does not rise to a level justifying discharge and does not remove Endy from the protection of the Act. See *Key Food*, 336 NLRB 111, 113 (2001) ("an employer cannot provoke an employee to the point where he commits an indiscretion and then rely on that conduct to terminate his employment.")

We therefore find that the Respondent violated Section 8(a)(3) and (1) by its suspension and discharge of Josh Endy.

[34] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[35] These included Endy's wearing a t-shirt and using earbuds while working.

[36] For this reason, we find it unnecessary to address the Respondent's argument that the judge should have applied *General Motors*, 369 NLRB No. 127 (2020), when considering the impact of Endy's outburst.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3:

By discharging Tara Golden, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act, and by suspending and discharging Josh Endy and Cathy Todd, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

2. Delete Conclusion of Law 4(b) and reletter the subsequent sub-paragraphs accordingly.

ORDER

The Respondent, NCRNC, LLC d/b/a Northeast Center for Rehabilitation and Brain Injury, Lake Katrine, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging or otherwise discriminating against employees for supporting 1199SEIU United Healthcare Workers East (the Union) or any other labor organization.

(b) Discharging or otherwise discriminating against supervisors for refusing to engage in unfair labor practices.

(c) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(d) Placing employees under surveillance to determine whether they are engaged in union or other protected concerted activities.

(e) Threatening employees with loss of their professional licenses or lawsuits because they engage in protected concerted activities.

(f) Interrogating employees about their union sympathies or the union activities of other employees.

(g) Telling employees that the Union is to blame for a freeze in their wages.

(h) 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) Within 14 days from the date of this Order, offer Josh Endy, Tara Golden and Cathy Todd full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Josh Endy, Tara Golden and Cathy Todd whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Josh Endy, Tara Golden, and Cathy Todd for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

(d) File with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Josh Endy's, Tara Golden's, and Cathy Todd's corresponding W-2 forms reflecting the backpay awards.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and suspension, and within 3 days thereafter, notify Josh Endy, Tara Golden and Cathy Todd in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

(f) 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.

(g) Post at its Lake Katrine, New York facility copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 3, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 October 31, 2019.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. December 16, 2022

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Lauren McFerran, Chairman

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting in part.

I agree with the majority on many of the issues in this case.[1] We part ways, however, with respect to three issues. First, I would reverse the judge's finding that the

[37] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

[1] Specifically, I join my colleagues in adopting the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by (1) creating an impression of surveillance when it told employee Kelly Leonard that it had her union activity on video, (2) implicitly threatening Leonard with the loss of her nursing license for engaging in union activity, and (3) posting a memo blaming the Union for the Respondent's decision to freeze wages. I also join my colleagues in adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by discharging Cathy Todd for engaging in union activity. Additionally, I join them in dismissing the allegation that the Respondent violated Sec. 8(a)(1) by instructing its supervisors to surveil employees.

Respondent violated Section 8(a)(1) by placing employees' union activity under surveillance. Second, I would reverse the judge's finding that the Respondent violated Section 8(a)(1) by discharging supervisor Tara Golden. Third, I would find that CSS Supervisor Josh Endy was a supervisor within the meaning of Section 2(11) of the Act, and I would therefore reverse the judge's findings that the Respondent violated the Act by threatening, interrogating, suspending, and eventually discharging him.

1. Surveillance and the Discharge of Supervisor Tara Golden

The majority finds that the Respondent unlawfully discharged a supervisory employee, Tara Golden, for refusing to obey what it finds to be an instruction to engage in unlawful surveillance of union activity, even though the instruction-to-surveil allegation must be dismissed, and there is no evidence that any union activity was observed. In my view, however, the conduct the Respondent instructed its managers and supervisors to engage in was not unlawful surveillance. Accordingly, I dissent from the majority's finding that the Respondent unlawfully surveilled employees. Moreover, the record fails to show that the Respondent discharged Golden for disobeying a directive to engage in "out of the ordinary" observation of employees' open union activities. Rather, the record shows that it was Golden's overall unwillingness to comply with her duty as a supervisor to participate in the Respondent's lawful opposition to the union-organizing campaign, and the Respondent's reasonable belief that Golden actually supported the Union, that motivated the Respondent's decision to discharge her.[2] Accordingly, I would find that Golden was not discharged for refusing to obey an instruction to commit an unfair labor practice. Because I believe the majority's decision on these points is contrary to established precedent and not supported by substantial evidence, I respectfully dissent.

The relevant facts may be briefly stated. After the Respondent became aware that its employees were discussing unionization in summer 2019, its parent company retained the services of a consulting firm. The consultants, who arrived on-site at the end of July, provided managers[3] with training regarding what they could and could not do in response to an organizing campaign. In addition, the consultants assessed the management at the facility by walking around the building, observing, and talking to employees to ascertain their concerns. The consultants discovered problems with leadership and recommended, among other things, that management be more visible to employees and develop a better rapport with them. Based on these recommendations, the Respondent asked managers to be more visible to employees by visiting the facility on their off time, walking through the building, talking to employees about their concerns, and offering them assistance with their work. The consultants also discovered significant employee dissatisfaction with the Respondent's director of nursing and director of human resources, both of whom were replaced as a result.

In late October, after the filing of the election petition, the consultants maintained a consistent presence at the facility, holding twice-daily meetings with management, including the Respondent's unit managers. At morning meetings, the consultants reiterated the "do's and don't's" under the Act, distributed a "fact of the day" flyer which they asked management to hand out to employees, and generally asked managers about what they were seeing and whether they had any questions. At the afternoon meetings, the consultants asked managers to provide feedback on how employees responded to the handouts—whether they showed interest or, to the contrary, whether they threw the flyers away without reading them—and their impressions regarding employees' perspectives on the Union.[4]

Other aspects of what management was asked to do may be inferred from the instructions given specifically to Golden. In addition to the foregoing, Golden was in-

[2] The majority accuses me of crafting a "hypothetical rationale" on the issue of Golden's discharge. I have not. The burden here is on the General Counsel to prove that the Respondent had an unlawful motive in discharging Golden. In finding that the General Counsel failed to satisfy her burden, I have drawn reasonable inferences from the record.

[3] For ease of reference, I will use the term *managers* to include both managers and statutory supervisors. The Respondent's unit managers, like Golden, are statutory supervisors.

[4] The judge found that managers and supervisors were also instructed to report back what they heard the Union was telling employees and whether the Union was approaching employees in the cafeteria or held a meeting over the weekend, and he further found that the only way managers would have been able to learn these things was by either interrogating employees or surveilling them. The judge based these findings on GC Exh. 11. That exhibit is an email from Keith Peraino, the head of the consultant team, cryptically stating, as an agenda item for a management meeting, "any statements fro[m] managers that the 1199 is still here such as '1199 said everything was frozen' or 'no one can get fired' or 'they are approaching employees in the cafeteria' or they had a meeting over the weekend." Contrary to the judge, interrogation or surveillance are not the only ways managers could acquire this information. Peraino's email may be understood as soliciting reports about statements that employees volunteered to managers or that managers may have overheard in the course of their lawful interactions with employees. Moreover, there is no evidence that any supervisor or manager was told to, or did, observe employees in the cafeteria or breakrooms on their nonworking time or before or after their shifts (let alone surveil employees on weekends to see if they attended a union meeting). To the contrary, the instruction to offer employees assistance with their work suggests that the managers were to interact with and observe employees while they were on duty.

structed to report back employees' body language and whether employees made eye contact with her while she was speaking with them. She was also instructed to report whether any employees crumpled up the "fact of the day" handouts she gave them and whether they talked with anyone after she spoke with them about the handouts. Golden was instructed to monitor the staff to see if they were doing their jobs,[5] to ask if they needed assistance, and to look out for suspicious activities, including whether employees gathered in groups, stopped speaking when managers walked by, or engaged in non-job-related activities. There is no evidence that any manager observed any union activity.[6]

The complaint alleges, and the judge found, several unfair labor practices premised on a mistaken view that the Respondent's antiunion campaign entailed unlawful surveillance of union activity. To the contrary, nothing about the Respondent's request that its managers and supervisors actively participate in the antiunion campaign, including by watching what employees do in the workplace as it might relate to the union-organizing effort and reporting their observations at daily meetings, amounted to unlawful surveillance in violation of the Act. The judge also found that Golden, a unit manager and statutory supervisor, was discharged for refusing to comply with instructions to engage in unlawful surveillance of employees' union activity, and the majority affirms this finding. For the reasons stated below, I disagree.

The Board has long held that "[u]nion representatives and employees who choose to engage in their union activities at the employer's premises should have no cause to complain that management observes them." *Milco, Inc.*, 159 NLRB 812, 814 (1966), enfd. 388 F.2d 133 (2d Cir. 1968); see, e.g., *Southwestwire Co.*, 277 NLRB 377, 378 (1985) ("[W]here the employees are conducting their activities in the open and on or near company premises, the Board has decided that surveillance is not unlawful."), enfd 820 F2d 453 (D.C. Cir. 1987). Had there been any union activity to be seen, observing it would have been perfectly lawful, since under well-settled precedent, "an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance." *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986).

There also was nothing unlawful about the Respondent requiring its supervisors to watch for union activity in the workplace and report what they observe. See *Florida Builders*, 111 NLRB 786, 787 (1955) ("[W]e do not adhere to the [] doctrine . . . that an employer's mere instructions to supervisors to ascertain information concerning the union activity of employees is violative of the Act, whether or not the instructions are accompanied by a direction that unlawful means be used to obtain the information . . . ."). The Board has often used emphatic and unequivocal language to describe an employer's right to instruct supervisors to participate in opposing an organizing campaign and to discipline them for not following instructions. In *Western Sample Book and Printing Co., Inc.*, 209 NLRB 384 (1974), the Board found that the employer acted lawfully when it discharged three supervisors because they "were not doing enough for the Company in its campaign against the Union," including failing to reveal "substantial information concerning the Union and the union activities of the employees whom they supervised." Id. at 389. The Board specifically affirmed the judge's decision on this point, id. at 384, which included the following:

> [T]here has been established a class of employees, meeting the statutory definition of supervisors, who can be brow beaten, harassed, threatened, and discharged for failure to prevent the unionization of the establishment where they are employed, or, as in the instant case, if the employer concludes that such supervisors have exerted insufficient energy in discovering information concerning the union and thereby failed to assist the employer's antiunion campaign.

Id. at 390. The Board reached the same result in *Purolator Products*, 270 NLRB 694 (1984), enfd. mem. 776 F.2d 365 (D.C. Cir. 1985), where it adopted the judge's finding that

> merely requiring supervisors to report what they see and hear in the normal course of their day, even though the supervisors detest being 'finks' and informers, and discharging the supervisors for failure to be adequate 'finks' in the employer's estimation, is not illegal. . . . The fact is that an employer has a legitimate interest in learning what his supervisors know, for the law imputes their knowledge to him.

Id. at 740. Accordingly, an instruction to supervisors to observe and report union activity in the workplace is not an instruction to engage in unlawful surveillance.

The Board has found unlawful surveillance where the employer's observations are calculated to interfere with or disrupt union activity. See *Gainesville Mfg. Co.*, 271

[5] The judge found that Golden testified that managers were requested to come in on their off shifts and monitor the staff. Golden's actual testimony with regard to monitoring was that "[y]ou were just monitoring staff to see if they were doing their jobs."

[6] The Board has dismissed an allegation of surveillance in the absence of evidence that supervisors or managers witnessed any union activity. See *Comar Glass Co.*, 244 NLRB 379, 379 (1979) (dismissing surveillance allegation where, during observation alleged as surveillance, "the only activity engaged in by employees consisted of their walking across the street to buy soft drinks").

NLRB 1186, 1188 (1984) (supervisors physically blocked distribution of leaflets on public property); *Hawthorn Co.*, 166 NLRB 251 (1967) (during organizing campaign, foreman adopted the practice of sitting at employee tables in the cafeteria instead of the foremen's table), enfd. in pertinent part 404 F.2d 1205 (8th Cir. 1969). Golden was not instructed to do any of these things. The Respondent asked Golden to report what she saw while observing and interacting with employees, and it sought to determine from those reports which employees were for and which against the Union. As the precedent discussed above makes clear, however, these facts provide no valid basis for finding a violation of the Act. To the contrary, the Respondent was perfectly within its rights in acting to ascertain its employees' union sentiments through observation of open union activity in the workplace and to require that its supervisors assist it in doing so.[7]

In sum, the facts of this case are clear: the Respondent's antiunion campaign required supervisors to actively engage with employees, to communicate the employer's viewpoint by distributing "fact of the day" flyers, and to report back what they saw and heard, including any union activity. At most, that is what Golden was instructed to do.[8] This was not an instruction to engage in unlawful surveillance, consistent with the principle that the Respondent was within its rights to require supervisors to carry out its campaign.

In finding to the contrary, the majority cites the principle that out-of-the-ordinary observation is unlawful, and they find that principle applicable here because supervisors were instructed to visit the facility on their off hours. Admittedly, some Board decisions may provide superficial support for this view. See, e.g., *Aladdin Gaming, LLC,* 345 NLRB 585, 585–586 (2005) ("[A]n employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive."). But the actual holdings of those cases are much narrower. Indeed, *Aladdin Gaming* itself went on to stress that "[i]ndicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." Id. at 586. Moreover, even taking the out-of-the-ordinary standard at face value, I reject my colleagues' finding that instructing supervisors to report to the workplace on their off hours makes this an instruction to engage in out-of-the-ordinary activity. Management is entirely within its rights to require its supervisors to report to the workplace at times of its choosing—and, as shown above, it is also within its rights to instruct its supervisors to participate in lawful efforts to oppose union organizing. It is not an unfair labor practice to exercise these rights simultaneously. A contrary finding would be unworkable because it would interfere with an employer's right to operate its business, including by changing how it manages and supervises employees. See *NLRB v. Jones & Laughlin Steel Co.,* 301 U.S. 1, 45–46 (1937) ("The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. . . . [T]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.").

Consistent with these principles, the Board has applied its "out of the ordinary" standard to the employer's conduct in observing union activity, not to anything out of the ordinary an employer might do. The focus has been on the way the employer undertakes its observation *of protected activities* and whether *that* behavior was itself "out of the ordinary." See, e.g., *Partylite Worldwide, Inc.*, 344 NLRB 1342, 1342 (2005); *Arrow Automotive Industries*, 258 NLRB 860, 860 (1981), enfd. mem. 679 F.2d 875 (4th Cir. 1982). In the vast majority of cases, the Board has found unlawful surveillance where management representatives positioned themselves in places that were out of the ordinary—typically in physical space,[9] but also in virtual "space"[10]—in order to observe

[7] The Respondent directed Golden to watch out for "suspicious activity," including whether employees gathered in groups, stopped speaking when managers walked by, or engaged in nonjob-related activities. Even assuming that this instruction would reasonably be understood to characterize union activity as "suspicious," there is no evidence that any employee was aware of this instruction. Further, because the Respondent could lawfully instruct its supervisors to observe open union activity, it is irrelevant that, in the course of doing so, it may have told the supervisors that it viewed such activities as suspicious.

[8] The judge credited Golden's testimony that she was told that the Respondent was "trying to figure out who was for the Union and who was not." For the purpose of deciding this case, I accept this credibility determination, even though the judge also found that Golden's testimony was confused, and there is considerable evidence that she may have been confused about what she was asked to do and about the sequence of events.

[9] See, e.g., *Boar's Head Provisions Co.*, 370 NLRB No. 124, slip op. at 1 fn. 2, 21–22 (2021) (finding surveillance where employer's security guards engaged in out-of-ordinary conduct by standing in employee parking lot observing employees as they distributed union flyers); *Stahl Specialty Co.*, 364 NLRB No. 56, slip op. at 15–16 (2015) (finding surveillance where employer's HR official engaged in out-of-ordinary conduct by repeatedly parking her car on driveway leading to employee parking lot to observe union handbilling of employees at entrance to driveway); *Alcoa, Inc.*, 363 NLRB 368, 381–382 (2015) (finding surveillance where employer's general manager engaged in out-of-ordinary conduct by positioning himself so that arriving employ-

union activity. In other cases, a finding of out-of-the-ordinary conduct has been based on unexplained or inadequately explained actions taken by a manager or supervisor while observing union activity—such as photographing, videotaping, or writing notes—even if the observation without more would have been lawful.[11] And the Board has found out-of-the-ordinary conduct based both on where the employer's agent positioned himself to observe union activity and what he did while doing so.[12]

Sprain Brook Manor Nursing Home, LLC, 351 NLRB 1190 (2007), cited by the majority, is not to the contrary. There, a nursing home administrator was found to have engaged in unlawful surveillance of union activity when she visited the facility at an out-of-the-ordinary time—a Saturday, when she was not ordinarily in the workplace—*and* positioned herself at an out-of-the-ordinary place—an exit door nearest employees attending a union meeting at the edge of the employer's property—and did so for the sole purpose of observing employees' union activities. Nothing in *Sprain Brook* suggests that the Board deemed the timing of the administrator's visit to the facility independently sufficient to make her conduct "out of the ordinary" and therefore unlawful.[13] Moreover, the administrator admitted that she was at the facility during her off hours solely for the purpose of observing union activity she knew would be taking place. In contrast, the Respondent's request to supervisors was not to come in on their off-duty time solely to observe known union activity, but rather to come in and engage and interact with employees while the employees were working their normal shifts in the workplace. Thus, *Sprain Brook* does not compel a finding that the presence of management at an unusual time is sufficient without more to constitute out-of-the-ordinary conduct for surveillance purposes.[14]

The majority's opinion also fails to take into account that the Respondent's rights under Section 8(c) are implicated here, and that substantial Board precedent protects those rights. As part of the Respondent's antiunion campaign, managers and supervisors distributed "fact of the day" flyers expressing the Respondent's viewpoint regarding unionization. There is no allegation or evidence that in these flyers, the Respondent threatened reprisals or force or promised benefits. Thus, the distribution of the flyers was conduct protected by Section 8(c) of the Act, regardless of whether their distribution was "out of the ordinary." See *Intertape Polymer Corp. v. NLRB,* 801 F.3d 224, 240 (4th Cir. 2015). In *Intertape Polymer*, the Fourth Circuit held that where an employer observes union activity in the course of its own 8(c)-protected conduct, a balance must be struck between the

ees would have to walk past him on their way to where union agents were distributing handbills 10 feet away), enfd. 849 F.3d 250 (5th Cir. 2017); *Durham School Services, L.P.*, 361 NLRB 407, 407 (2014) (finding surveillance where supervisor who typically worked at rear of facility positioned herself in front of facility to observe union activity); *Allied Medical Transport, Inc.*, 360 NLRB 1264, 1278 (2014) (finding surveillance where employer's CEO parked 10 feet away from entrance to hotel and watched as employees entered to attend union meeting), enfd. 805 F.3d 1000 (11th Cir. 2015); *Partylite Worldwide, Inc.*, 344 NLRB 1342, 1342 (2005) (finding surveillance where managers and supervisors engaged in out-of-ordinary conduct by standing at entrances to employee parking lot watching employees taking literature from union agents); *Yenkin-Majestic Paint Corp.*, 321 NLRB 387, 394–395 (1996) (finding surveillance where managers engaged in out-of-ordinary conduct by standing at plant entrances during shift change to observe union handbilling of employees), enfd. mem. per curiam 124 F.3d 202 (6th Cir. 1997); *Parsippany Hotel Management Co.*, 319 NLRB 114, 117–118, 126 (1995) (finding surveillance where security guards trailed pro-union employees out for a walk, stopping when they stopped and following when they proceeded), enfd. 99 F.3d 413 (D.C. Cir. 1996); *Arrow Automotive Industries*, 258 NLRB at 861 (finding surveillance where supervisors engaged in out-of-ordinary conduct by standing at each of three entrance gates, observing employees as they passed union handbillers); *Dadco Fashions, Inc.*, 243 NLRB 1193, 1198–1199 (1979) (finding surveillance where supervisor attended union meeting held at a church and repeatedly drove past a second union meeting held in a roadside park), enfd. 632 F.2d 493 (5th Cir. 1980) (abrogated on other grounds by *NLRB v. U.S.A. Polymer Corp.*, 272 F.3d 289 (5th Cir. 2001)).

[10] See, e.g., *National Captioning Institute, Inc.*, 368 NLRB No. 105, slip op. at 5–6 (2019) (finding surveillance where employer, through management-friendly employee, monitored an invitation-only employee Facebook group dedicated to discussing unionization); *AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 1 fn. 4, 24–25 (2018) (finding surveillance where employer scrutinized union sympathizers' Facebook pages), enfd. 966 F.3d 813 (D.C. Cir. 2020).

[11] See, e.g., *Spectrum Juvenile Justice Services*, 368 NLRB No. 102, slip op. at 14 (2019) (finding surveillance where employer's executive director jotted notes while observing picketers); *Crown Cork & Seal Co.*, 254 NLRB 1340, 1340 (1981) (finding surveillance where, even assuming observation of union handbilling was otherwise lawful, personnel manager took notes while observing handbilling, and no explanation for doing so was offered), enfd. mem. 691 F.2d 506 (9th Cir. 1982); *Barnes Hospital*, 217 NLRB 725, 727–728 (1975) (finding surveillance where security guard, without adequate reason for doing so, videotaped employees taking handbills from union organizers); *Holly Farms Poultry Industries*, 186 NLRB 210, 210 fn. 1, 212–213 (1970) (finding surveillance where employer's safety director, without justification for doing so, photographed employees taking literature from union agents).

[12] See, e.g., *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991) (finding surveillance where employer's president parked within 15 feet of union organizer, watched employees as organizer handed them literature, and spoke into his car telephone as he watched until organizer left).

[13] Contrary to the majority's suggestion, *Sprain Brook* simply does not present the issue of whether the manager would have unlawfully surveilled employees if she had merely been at the office at an unusual time for a legitimate reason—for example, if she had to catch up on time-sensitive paperwork—and, while there, occasionally glanced at the union meeting while looking out her office window.

[14] *Intermedics, Inc.*, 262 NLRB 1407 (1982), cited by the majority, is distinguishable. The supervisors' observation of employees in that case had no ostensible purpose other than to observe protected activity.

employer's rights under Section 8(c) and the employees' rights under Section 7. 801 F.3d at 238.[15] In the instant case, there is no such balance to be struck. There is no evidence that employees observed by management were ever seen to engage in union activity, so there is nothing to put in the balance against the Respondent's right to communicate its views regarding unionization. Under these circumstances, a finding that the Respondent unlawfully surveilled its employees merely because its managers and supervisors engaged in out-of-the-ordinary conduct by visiting the workplace at unusual times—assuming arguendo such may constitute out-of-the-ordinary conduct—would amount to nothing less than a nullification of the Respondent's right under Section 8(c) to express its views.

Even more concerning is the majority's suggestion that an employer's observation of employees' reactions to being handed antiunion literature constitutes out-of-the-ordinary surveillance. It is virtually impossible for a supervisor to hand such literature to an employee without noticing his or her reaction. Thus, on my colleagues' view of the law, an employer would provide a basis for the General Counsel to allege, and the Board to find, that it had surveilled employees in violation of Section 8(a)(1) simply by engaging in the unquestionably Section 8(c)–protected act of passing out antiunion literature in person. What's worse, in-person conversation generally includes observing, and responding to, the reactions of one's interlocutor. Thus, if the majority were correct, attempting to engage in one-on-one persuasion would not merely be evidence of surveillance but would, in fact, constitute unlawful surveillance. Either of these results runs headlong into Section 8(c), which expressly provides that the "expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not *constitute* or *be evidence of* an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (emphasis added).

As cases I have cited above clearly establish, it is not unlawful surveillance for a supervisor to observe open union activity on or near the employer's property. While I do not question that an employee's reaction to being handed antiunion literature in the workplace by a supervisor can be deemed protected activity, it is protected activity that cannot possibly occur other than openly in the presence of the supervisor. It is therefore strange to suggest that it is even capable of being surveilled. Rather, the appropriate lens through which to view an employer seeking to induce employees to reveal their union sympathies is *interrogation* or *polling*. Cf. *Allegheny Ludlum Corp.*, 333 NLRB 734, 745–746 (2001) (employer unlawfully polled employees by asking them to appear in antiunion campaign video), enfd. 301 F.3d 167 (3d Cir. 2002). But here, there is no allegation that the Respondent engaged in coercive interrogation by passing out literature to employees, nor would such conduct amount to unlawful interrogation under our precedent.[16] Simply put, it is not unlawful for employers to seek to determine which employees support the union—provided, of course, that they do not use unlawful means to do so.

Finally, even assuming arguendo that visiting the facility on off-duty time, without more, qualifies as out-of-the-ordinary conduct, the record fails to establish that Golden's unwillingness to visit the facility off-shift was the reason for her discharge. What the record demonstrates is that it was Golden's overall unwillingness to fully support the Respondent's antiunion campaign as a supervisor, as well as the Respondent's reasonable belief that Golden actually supported the Union, that were the reasons for the discharge.[17] The Respondent was entitled to discharge Golden for these reasons. See, e.g., *Western Sample Book and Printing Co., Inc.*, 209 NLRB at 390 (holding that employer can discharge supervisors for "failure to prevent the unionization of the establishment . . . or . . . if the employer concludes that such supervisors have exerted insufficient energy in discovering information concerning the union and thereby failed to assist the employer's antiunion campaign"). Substantial evidence does not support a finding that the Respondent unlawfully discharged Golden for refusing to obey instructions to engage in unlawful surveillance.

By her own admission, Golden never embraced the

[15] Contrary to majority's suggestion, the fact that the supervisors' leafletting in *Intertape* began before the union's was not essential to the Fourth Circuit's holding, as demonstrated by the court's favorable citation to *Arrow-Hart, Inc.*, 203 NLRB 403 (1971), and *Aladdin Gaming,* above, 345 NLRB 585. *Arrow-Hart* also involved simultaneous leafletting by an employer and union in close proximity. Unlike in *Intertape*, however, there was no finding that the employer's leafletting began before the union's. If anything, the judge's vague finding in *Arrow-Hart* that the union began electioneering 7 days before the election and the employer campaigned 3 of those days suggests that the employer began leafletting after the union. 203 NLRB at 405. And in *Aladdin*, on two separate occasions, managers approached employees engaged in off-duty solicitation in the employee dining room to discuss management's view of unionization. 345 NLRB at 586.

[16] See *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), affd. sub nom. *Hotel & Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[17] Peraino testified that the Respondent feared that Golden was trying to aid the Union by intentionally drawing an unfair labor practice charge. Tr. 827. There is, therefore, no contradiction between the Respondent's assertion that it fired Golden for interrogating employees about their union support and my finding that the Respondent discharged her for supporting the Union.

Respondent's efforts to communicate its message. Indeed, the judge found that the Respondent lawfully suspended her on October 28 because it believed that she supported the Union, and there are no exceptions to that finding. With regard to her participation in the Respondent's campaign, Golden testified that she initially attempted to talk to and educate staff about the pros and cons of the Union, "[b]ut for the most part, I told the staff to do their own research." Starting the week of November 11, moreover, Golden "shut down" and "was very discouraged about what was happening in the building" with the Respondent's campaign. While she "continued to take the [Respondent's campaign] literature . . . and bring it to the units," she refused to "speak to the staff about the literature anymore." In addition, although Golden continued to attend the daily meetings that the consultants held with supervisors, she stopped participating in the discussions, and she stopped going to other units during her duty time as she had been directed to do. Instead, Golden expressed opposition to the Respondent's campaign, complaining that "people were coming up on the units that didn't belong on the units, talking to staff about the Union that didn't need to be there." At one meeting, Golden also voiced an employee's complaints about the campaign. As the judge noted, she also refused to visit the facility on off-duty time.

After one of the consultant meetings, during which Golden testified that she was "very upset," the Respondent's senior managers met with her. According to Golden's credited account of that meeting, Regional Vice President Mary Pat Carhart "asked me what I had to say. And I exploded and said that this was a witch hunt and it was ridiculous, that people they had for the Union were not for the Union. And that people—there was hostility in the building." (Tr. 75.) At this meeting, Golden was confronted with a new allegation about her support for the Union. Specifically, she was informed that she had been seen handing out Union cards. Golden denied the allegation, going so far as to claim that she had never even seen a Union card. On November 20, the Respondent discharged Golden.

At the time of her discharge, Golden had refused to participate in many aspects of the Respondent's antiunion campaign and had twice been suspected of conduct supporting the Union. The judge, whose decision the majority adopts in relevant part, did not consider any of this conduct and instead concluded that Golden's refusal to participate in unlawful surveillance was the reason for her discharge. In making this finding, the judge cited only Weir's testimony that "there was a frustration that she continued to do the same things that she had been educated not to do; not learning how to be a manager and to take those kind of directions regarding what we are able and could be . . . doing." This statement by Weir, the judge concluded, proves that the Respondent's reason for discharging Golden was her refusal to comply with "the consultants' directives." The judge listed those "directives" in his decision without explaining precisely what, in them, constituted an instruction to engage in unlawful surveillance. He seems to have found Peraino's statements in the email introduced into the record as GC Exhibit 11 particularly damning in this regard. I have already explained why that email does not support the judge's finding that interrogation or surveillance were the only ways managers could obtain the information Peraino sought. Among the other "directives" the judge listed was the instruction to visit the facility on off-duty time. To the extent the judge found that Golden was discharged for refusing to comply with that directive, the record as a whole does not support such a finding.

First, as noted above, the Respondent lawfully suspended Golden on October 28 because it believed that she supported the Union. Golden's conduct after her suspension gave the Respondent every reason to believe that she continued to support the Union. Indeed, the Respondent specifically cited those concerns at the climactic November 11 meeting only nine days before Golden was discharged. That the Respondent knew Golden did not support its antiunion campaign is clear. Golden had been criticized for failing to report what she observed;[18] she had mostly stopped participating in consultant meetings; and to the extent she did participate in those meetings, she appeared to be advocating for employees by expressing their concerns. To the extent there was any doubt about Golden's supervisory loyalty to the Respondent in its campaign, it was extinguished at the meeting with Carhart, where Golden, by her own description, "exploded" and called the Respondent's campaign a "witch hunt." All this evidence supports a finding that Golden's support for the Union and her lack of support for the antiunion campaign were the reasons she was discharged, and lawfully so. *Purolator Products*, 270 NLRB at 740 ("[D]ischarging the supervisors for failure to be adequate 'finks' in the employer's estimation, is not illegal."); *Western Sample Book,* 209 NLRB at 389 (supervisors lawfully discharged because in management's opinion, "they were not doing enough for the Company in its campaign against the Union"); *Parker-*

[18] After Golden returned from her suspension on November 4, the Respondent told Golden that she was "a great actress, a great liar or clueless" based on her reporting. She also had to be counseled not to report whether she thought employees were for or against the union, but only to report body language, whether or not they made eye contact with her, and how they reacted to the company literature.

Robb Chevrolet, 262 NLRB 402, 404 (1980) ("The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is not unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act."), rev. denied 711 F.2d 383 (D.C. Cir. 1983); accord *Florida Power & Light Co. v. IBEW Local 641*, 417 U.S. 790, 808 (1974) ("Congress sought to assure the employer of the loyalty of his supervisors by reserving in him the right to . . . discharge such supervisors because of their involvement in union activities or union membership . . . ").

On the other hand, besides timing, the record does not support a finding that Golden's refusal to come in on off-duty time was the reason for her discharge. Unlike Golden's alleged activity in support of the union and her opposition to the antiunion campaign, there is no evidence that the Respondent had been aware of Golden's refusal to come in during off-duty times until the very end. Moreover, there is nothing in the record to suggest that the Respondent attempted to enforce the off-duty requirement or had any discussions with her about not coming in. Senior managers had raised with Golden other concerning conduct, specifically her alleged union support and her characterization of the campaign as a "witch hunt," but there is no evidence that they expressed concern over whether she was coming in on her off-duty time. There is nothing linking Golden's discharge to her refusal to visit the facility while off duty until, according to the judge's decision, Golden expressed her opposition to coming in on her off-duty time at the contentious meeting with management officials.[19] But even in that context, Golden was not responding to any criticism or complaint by the Respondent over her off-duty conduct. Rather, it was Golden who brought up that subject when she declared what she was unwilling to do to prove that she wasn't a union supporter. No one in the meeting reacted negatively to this statement, despite management officials having reacted negatively at that same meeting to Golden's "witch hunt" comment. In sum, the evidence demonstrates that the Respondent's focus at this contentious meeting was its reasonable belief that Golden supported the Union and her opposition to the Respondent's antiunion campaign.

Nor is this evidence contradicted by the Respondent's statement that Golden was discharged for failing to make the transition from a unit nurse to a supervisor. According to Golden's credited testimony, administrator Patrick Weir told Golden that she was no longer "a good fit," she did not seem to be able to make the transition into a management role, and she was being relieved from her post. Golden asked what she had done wrong and what she could work on from a managerial standpoint. Weir repeated that it was just not a good fit, the Company was going in a different direction, and she was no longer employed. The judge and my colleagues find this explanation pretextual. It was not pretextual. It was an accurate explanation. As the record demonstrates, Golden was terminated because she failed to act like a supervisor instead of an employee in carrying out the Respondent's campaign. Indeed, "fail[ing] to transition from unit nurse to UM" exactly describes Golden's failure and is exactly why the Respondent fired her.[20]

For the reasons stated above, I would reverse the judge's findings that the Respondent engaged in unlawful surveillance of union activity or unlawfully instructed its managers and supervisors to engage in unlawful surveillance.[21] And even if the Respondent's instructions to its managers and supervisors included a component that constituted out-of-the-ordinary conduct—i.e., visiting the facility during off-duty times—the record shows that the Respondent discharged Golden for her overall unwillingness to participate in the Respondent's antiunion campaign and because it reasonably believed Golden supported the Union. Accordingly, I would reverse the judge's findings that the Respondent violated Section 8(a)(1) by engaging in unlawful surveillance and by discharging Golden for refusing to commit an unfair labor practice, and I dissent from the majority's contrary findings.

2. Josh Endy's Supervisory Status

The majority also upholds the judge's finding that

[19] The judge credited Golden's testimony that, in this meeting, she "reiterated that [she] was not willing to come in on [her] off time and monitor staff, to prove to them that [she] was not a Union organizer or a Union leader, and that [she] was not going to other units to monitor staff on [her] on-time either." For the purposes of deciding this case, I accept the credibility determination, even though Golden offered this testimony in response to a leading question by counsel, who asked Golden whether she "discussed any activities or activities off work time" after Golden testified that she did not recall saying anything else at that meeting. Golden's statement is the only evidence in the record that the Respondent knew of her refusal to come in off-duty.

[20] Accepting the Respondent's stated—and truthful—reason for discharging Golden renders the judge's other grounds for finding the discharge unlawful irrelevant. Golden's prior performance and lack of prior discipline, and the fact that the director of nursing was not involved in the decision to discharge her, are immaterial if the decision was over her failures in the union campaign. For the same reason, comparator data involving other misconduct are also immaterial. On the other hand, the judge's finding that Golden's termination was "motivated by the consultants" only further supports the conclusion that her termination was for failing to meet the Respondent's supervisory expectations in the campaign, which the consultants were directing.

[21] As noted above, I also agree that the instruction-to-surveil allegation must be dismissed for the additional reasons given by the majority.

Community Support Services (CSS) Supervisor Josh Endy was an employee, not a statutory supervisor. In my view, the majority places undue emphasis on the unskilled nature of CSS employees' work and overlooks the competing, employee-specific factors that CSS supervisors consider in assigning employees to very different posts.

In support of my conclusion that Endy exercises independent judgment in assigning employees, a few points bear emphasizing.[22] First, it takes a minimum of 10 to 15 minutes—and frequently takes as many as 30 minutes—for a CSS supervisor to assign the seven to ten CSS employees each evening, and the nursing supervisor spends another 15 minutes each evening reviewing the assignments. Second, the duties corresponding to the different posts can vary considerably, from staffing the front desk to prolonged observation of residents who pose a danger to themselves or others. Third, CSS supervisors consider a number of competing factors when making assignments—employee preference, ability, experience, and relationships with particular patients, as well as the need to fairly distribute difficult assignments—and although the CSS supervisors briefly utilized a strict rotation system, they abandoned it after less than 2 months.

The judge found Endy and fellow CSS Supervisor Josie Cruz used routine judgment, not independent judgment, in assigning employees because "all CSS staff were capable of performing all posts, and none of them had any special training or education that made them uniquely qualified for any particular assignment," and the majority adopts that finding. I am not persuaded by this analysis.

As an initial matter, I disagree with the majority's characterization of the assignments as "routine." The assignments at issue vary considerably, and an ill-conceived assignment could lead to serious consequences. For example, assigning an employee who lacked the necessary experience to conduct close visual observation of an NBI[23] resident could place the employee, the resident, and possibly other residents in danger. Further, the testimony established that the CSS supervisors consider multiple factors in making assignments, including experience, employee preference, employees' relationships with particular residents, and the relative difficulty of various assignments to ensure that the more challenging ones are distributed equitably over time, while also taking care not to assign anyone to a post he or she cannot safely handle. Weighing these several factors, CSS supervisors make assignment decisions "free of the control of others" by "discerning and comparing data," exercising judgment in a manner that "rise[s] above the merely routine or clerical." *Oakwood Healthcare*, 348 NLRB 686, 693 (2006). The fact that it ordinarily takes the CSS supervisors between 10 and 15 minutes (and as many as 30 minutes if an employee calls out, as frequently happens) to assign 7 to 10 employees supports a conclusion that the assignments require thought and deliberation. Likewise, the fact that the Respondent quickly abandoned a mechanical assignment method—the strict rotation system tried for less than 2 months in 2018—indicates a need for independent judgment in the assignment process. I also do not believe that the nursing supervisor would devote 15 minutes a day to reviewing the duty roster if the assignments were as routine as the majority suggests.

I further disagree with the majority's suggestion that the unskilled nature of the CSS employees' work means that Cruz and Endy must not use independent judgment when making assignments. In this regard, although the record indicates that employees do not have training that would make employees particularly suited for certain posts, it does not follow that CSS employees are interchangeable. The record reflects that the CSS supervisors consider employees' ability to staff various posts as well as their rapport with residents when assigning employees to CVO[24] and IS[25] duties. Thus, although CSS employees are not qualified to work one post over another based on formal training, they are far from interchangeable, and the CSS supervisors consider their relative abilities and other characteristics that make certain employees a better fit than others for certain posts. Moreover, the CSS supervisors also balance these factors against potentially competing considerations, such as employee preference and the need to rotate difficult assignments. I would find that in doing so, the CSS supervisors exercise independent judgment in assigning CSS employees. See *Oakwood Healthcare*, 348 NLRB at 698 (finding that charge nurses exercised independent judgment in assigning nursing personnel to patients where charge nurses made assignments "based upon the skill, experience, and temperament of . . . nursing personnel and on the acuity of the patients").[26]

[22] Because I would find that Endy is a supervisor based on his authority to assign employees, I find it unnecessary to reach the Respondent's separate arguments that Endy is a statutory supervisor because he possesses authority to discipline or responsibly direct employees.

[23] The NBI is the neurobehavioral intensive stabilization and rehabilitation program unit, where the Respondent houses patients who have behavioral problems that pose a risk of harm to themselves or others.

[24] Close visual observation of a single resident.

[25] Increased supervision. IS entails performing checks on certain patients every 15 minutes.

[26] The judge distinguished *Oakwood Healthcare* on the basis that (1) the individuals found to be supervisors in *Oakwood Healthcare* made

Because Endy possesses the authority to assign using independent judgment, he is a supervisor within the meaning of Section 2(11) of the Act. As Endy is not a statutory employee, I would dismiss the allegations that the Respondent discriminatorily suspended and discharged him in violation of Section 8(a)(3) and (1) and that it threatened and coercively interrogated him in violation of Section 8(a)(1). See *Parker-Robb Chevrolet, Inc.*, 262 NLRB at 404.

Dated, Washington, D.C. December 16, 2022

John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

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 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 suspend, discharge or otherwise discriminate against any of you for supporting 1199 SEIU United Healthcare Workers East (the Union) or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against supervisors for refusing to engage in unfair labor practices.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT place you under surveillance to determine whether you are engaged in union or other protected concerted activities.

WE WILL NOT threaten you with the loss of your professional licenses or a lawsuit if you engage in protected concerted activity.

WE WILL NOT interrogate employees about their union sympathies or the union activities of other employees.

WE WILL NOT tell you that the Union is to blame for a freeze in your wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Josh Endy, Tara Golden, and Cathy Todd full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Josh Endy, Tara Golden, and Cathy Todd whole for any loss of earnings and other benefits resulting from their discharges and suspensions, less any net interim earnings, plus interest, and WE WILL also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of their unlawful discharges and suspensions, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Josh Endy, Tara Golden, and Cathy Todd for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by

assignments "on a regular basis" rather than each night; (2) in the instant case, "staff were rotated so that employees shared the difficult tasks or patients"; and (3) "unlike the situation in *Oakwood Healthcare*, nothing suggests that the assignments Endy or Cruz made had any bearing on employees' opportunities to be considered for future promotions or rewards." My colleagues distinguish *Oakwood Healthcare* on the basis that the Respondent "has not met its burden to produce clear evidence of the requisite special skills or training for certain staff members as compared to others in performing particular tasks."

I am not persuaded by the judge's or my colleagues' attempt to distinguish *Oakwood Healthcare*. First, if anything, the greater frequency of the CSS supervisors' exercise of their authority to assign tends rather to support than detract from their supervisory status. Second, as explained above, rotating assignments to achieve an equitable distribution of difficult tasks and patients is just one factor among others that CSS supervisors take into consideration in making assignments. Third, the impact of assignments on employees' opportunities for promotion or other rewards played no role whatsoever in the Board's determination of whether the charge nurses at issue in *Oakwood Healthcare* possessed authority to assign and exercised independent judgment in doing so. Finally, my colleagues read *Oakwood Healthcare* too narrowly. As the language quoted above shows, the Board there found that the charge nurses whose supervisory status was at issue exercised independent judgment in assigning nursing personnel to patients where the charge nurses made assignments "based upon the skill, experience, and temperament of . . . nursing personnel and on the acuity of the patients." 348 NLRB at 698.

agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL file the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Josh Endy's, Tara Golden's, and Cathy Todd's corresponding W-2 forms reflecting the backpay awards.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharges of Josh Endy, Tara Golden, and Cathy Todd, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspension and discharges will not be used against them in any way.

NCRNC, LLC D/B/A NORTHEAST CENTER FOR REHABILITATION AND BRAIN INJURY

The Board's decision can be found at https://www.nlrb.gov/case/03-CA-252090 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Alice Pender, Esq., for the General Counsel.
Dawn Lanouette, Esq. (Hinman, Howard &Kattell, LLP), for the Respondent.
Amelia K. Tuminaro, Esq. (Gladstein, Reif & Meginniss, LLP), for Charging Party SEIU.
Lisa F. Joslin and *Nancy Williamson, Esqs. (Gleason, Dunn, Walsh & O'Shea),* for Charging Party Golden.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises from a consolidated complaint and notice of hearing (the complaint) issued on May 19, 2020, based on unfair labor practice charges that 1199SEIU United Healthcare Workers East (the Union) and Tara Golden (Golden), an individual, filed against NCRNC, LLC d/b/a Northeast Center for Rehabilitation and Brain Injury (the Respondent or the Company).

Pursuant to notice, I conducted a remote trial by Zoom from January 25–29, 2021, during which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

1. Did the Respondent violate Section 8(a)(1) by the following:

(a) On October 28, 2019,[1] by Dave Camerota (Camerota), chief operating officer, Upstate Services Group New York (USG), the Respondent's parent company, create the impression of surveillance of employees' union activity?

(b) On the same date, by Camerota, threaten Unit Manager (UM) Golden about her perceived union activity?

(c) In about October or November, by Camerota and the Respondent's labor consultants, instruct its supervisors and agents to interrogate employees about their support for the union, surveil their activities, and report back?

(d) On November 11, by Keith Peraino (Peraino), the Respondent's chief labor consultant, interrogate Community Support Services (CSS) Supervisor Josh Endy (Endy) about the union activities of other employees?

(e) On the same date, by Peraino, threaten Endy with a lawsuit by stating that the Respondent and the Union were going to sue him for passing out union authorization cards?

(f) About November 12, by Peraino, threaten licensed practical nurse (LPN) Kelly Leonard (Leonard) by stating that the Union could not protect her nursing license?

(g) About the same date, by John Walters (Walters), head of maintenance, tell Leonard that the Respondent had surveillance video of her talking to employees and giving them authorization cards, thereby creating an impression that her union activities were under surveillance?

(h) About November 18, by Mary Pat Carhart (Carhart), USG regional vice president of clinical affairs, interrogate Golden about her perceived union activity?

(i) On November 19, by Patrick Weir (Weir), administrator, during a telephone call, threaten LPN Cathy Todd (Todd) with revocation of her nursing license?

(j) bout December 20, by Weir, in a posted writing, tell employee that the Union was to blame for their not getting a wage increase?

2. Was Golden a supervisor within the meaning of Section 2(11) of the Act?

3. If not, was she suspended on October 28 and discharged on November 20 because the Respondent believed that she engaged in union activities; or because of her performance as UM and because she violated the labor consultants' instructions not to talk to employees about their union activities?

4. If so, was she discharged because she refused to commit unfair labor practices; or because of her performance as UM?

5. Was Endy a statutory supervisor within the meaning of Section 2(11) of the Act?

6. If not, did the Respondent suspend and discharge him on November 11 because he

engaged in union activities, erroneously concluding he was not an employee covered by the Act; or because of his conduct on November 11?

[1] All dates hereinafter occurred in 2019 unless otherwise indicated.

7. Did the Respondent suspend Todd, on November 13 and discharge her on November 19 because she engaged in union activities; or because she engaged in misconduct toward patients and made medication errors?

At trial, I granted the motion of the Acting General Counsel (hereinafter the General Counsel) to withdraw paragraph 6(a) of the complaint.

Witnesses and Credibility

The General Counsel called Endy, Golden, and Todd, and former employee Leonard.

The Respondent called the following witnesses:

(1) Peraino

(2) Weir

(3) Robin Boice (Boice), assistant director of nursing (ADON)

(4) Heather Britton-Schrager (Britton-Schrager), social worker

(5) Carolyn Carchidi (Carchidi), director of nursing (DON)

(6) Julie Cole (Cole), director of medical records and legal liaison

(7) Josie Cruz (Cruz), CSS supervisor

(8) Marcos DeAbreu (DeAbreu), CSS director

(9) Sheranique Lewinson (Lewinson), certified nursing assistant (CNA)

(10) Cindy Pope (Pope), LPN coordinator and former UM.

I will address credibility section-by-section, applying several well-establish judicial precepts. The first is that our system of jurisprudence has what is called the "missing witness rule" that gives a judge discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably be assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent and thus within its authority or control. *Natural Life, Inc. d/b/a Heart & Weight Institute,* 366 NLRB No. 53 (2018), slip op. at 1 fn. 1, citing *Electrical Workers IBEW Local 3 (Teknion, Inc.),* 329 NLRB 337, 337 fn. 1 (1999); see also *Reno Hilton,* 326 NLRB 1421, 1421 fn. 1 (1998), enfd. 196 F.3d 1275 (D.C. Cir. 1999). In that event, it is appropriate to draw an adverse inference regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988); see also *Interstate Circuit v. U.S.*, 306 U.S. 208, 225–226 (1939).

The Respondent did not call its admitted agents Camerota, Carhart, or Walters, and advanced no reasons why they could not be present. I therefore draw an adverse inference from their failure to testify. On the other hand, I will not draw such an inference from the Respondent's not calling former DON Kathy McCormick (McCormick) because a former manager or supervisor is generally not considered to be under a party's control. See *Natural Life, Inc.*, above; *Levingston Shipbuilding Co.*, 249 NLRB 1, 19 (1980); see also *Apex Linen Service, Inc*., 366 NLRB No. 12, slip. op at 1 fn. 1 (2018).

Secondly, a witness may be found partially credible because the mere fact that the witness is discredited on one point does not automatically mean he or she must be entirely discredited. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Id. at 798–799; see also *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1183 fn. 13 (2004); *Excel Container*, 325 NLRB 17, 17 fn. 1 (1997). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), regarding witness testimony, "[N]othing is more common in all kinds of judicial decisions than to believe some and not all."

Finally, when credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69 slip op. at 1 fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, written and oral stipulations, and the thoughtful posttrial briefs that all parties filed, I find the following.

The Respondent's Operation

At all material times, the Respondent has been a corporation with an office and place of business in Lake Katrine, New York (the facility), providing long term rehabilitation and brain injury care. The Respondent admits jurisdiction as alleged in the complaint, and I so find.

The Respondent is owned by USG, whose chief operating officer (Camerota) has authority over Weir, the facility's administrator and highest-ranking official. The facility is considered a nursing home with a special population of residents or patients (neighbors) who are assigned to units according to the medical assessment of their needs and functions. The Company employs a total of about 415 employees. R. Exh. 59 is an organizational chart showing the departments in the brain injury program: CSS, dietary, nursing, rehabilitation, and therapeutic services.

A DON and two ADONs head the nursing department, which manages eight units and has a total of 175–200 employees. The next level consists of a nursing supervisor and eight UMs or nurse managers, who are registered nurses (RNs). The nursing supervisors and UMs oversee staff RNs, LPNs, certified nursing assistants (CNAs), and CNA assistants.

The CSS department is responsible for checking and caring for neighbors' behaviors, protecting safety, and signing neighbors out and in. There are around 46 employees in the department. Under the director, there are two CSS supervisors for

each of the three shifts,[2] working 5 days a week, with every other weekend off. CSS duties include one-on-one close visual observations (CVOs) and 15-minute checks on neighbors in the neurobehavioral intensive stabilization and rehabilitation program unit (NBI), where patients with the most severe brain injuries require the most ongoing attention.

Union Organizing Efforts

Union organizing efforts at the facility began in June. Thereafter, union representatives met with employees on numerous occasions at various locations, including Angela's Pizza, an ice cream parlor across the street, outside the building during shift changes, and off the road leading to the facility.

The Union filed a petition on October 28, the withdrawal of which the Regional Director approved on October 30 (Jt. Exhs. 1, 2). Also, on October 30, the Respondent filed an RM petition (Jt. Exh. 3). I take administrative notice that the Regional Director dismissed this petition and that the Board denied the Respondent's petition for review on February 5, 2020. 2020 WL 1182437.

The Company's Response

A. Meetings

By July 5, management was aware that employees were talking about unions due to the staffing crisis. See GC Exh. 8 at 3, an email from Weir to Seth Rinn (Rinn), USG regional manager. In subsequent emails in July, Camerota and Weir discussed ways to improve employee morale by having more communication with staff and addressing their concerns "in order to get ahead of the union talk." (ibid at 1–2).

USG retained the services of Peraino of CSAV360, a management consulting company (the consultants), whose team first arrived at the facility on July 29. See GC Exh. 9. For about 8 days, they met with managers in the administrative conference room[3] to train them on what they lawfully could and could not do under the NLRA. They also held nonmandatory meetings with employees starting in late August or early September and going into October.

In late October, following the filing of the RC petition, the consultants returned to the facility on a consistent basis for about 4 weeks. Peraino came regularly from Monday through Thursday. The consultants conducted daily morning and afternoon meetings with Weir, directors from the brain injury program, and UMs.

At morning meetings, the consultants reiterated the do's and don'ts under the Act. They distributed a "fact of the day," a quote from the NLRB.gov website, which they asked management to hand out to employees. They also went around the room and asked managers if they had questions and to tell them what was going on, what the issues were, and how the Company should be messaging employees.

In a November 11 email to Weir regarding the management meeting that morning (GC Exh. 11), Peraino stated as one of the items to be addressed:

> [A]ny statements fro[sic] managers that the 1199 is still here such as "1199 said everything was frozen" or "no one can get fired" or "they are approaching employees in the cafeteria" or the had a meeting over the weekend" – of these statements and actions are being done and we need the details for the lawyer on Tuesday morning by noon.

I will later address Golden's testimony about what the consultants asked her and other managers to do since that is interwoven with the circumstances of her suspension and discharge.

At afternoon meetings, the consultants asked the managers to give feedback on how employees had responded to the handouts—thrown them away without reading them and shown or not shown an interest—in order to get an idea of their reactions. The managers were asked their impressions regarding employees' perspectives on the Union. Weir equivocated when asked on cross-examination by Golden's attorney whether managers were specifically asked for the names of individuals they thought appeared prounion, but he did testify that he and Peraino had conversations about which employees appeared to be pro- or antiunion. The consultants also met one-on-one with managers concerning their communications with employees.

In addition, the consultants held meetings with employees, designed not to mix employees with a "soft support" for the Union with those with "hard-core support," based on their managers' assessments and the employee's body language (Peraino at Tr. 832). See GC Exh. 12, an October 31 email from Peraino to Weir, which impeached Weir's testimony that he was never told to send employees considered soft in their union support to meetings.

On November 17, Peraino emailed Weir, copying Camerota (U. Exh. 14), with the subject, "Job descriptions and rates of pay." One topic was prounion people leaving the building through a side door where the lock was broken and no one swiped to enter or exit. He stated, "They walk off the property yo[sic] meet with the union. On Saturday they went to talk to the now terminated CSS supervisor Josh. It was Carlington, his girlfriend, Kelly Leonard, Alex and 1 more unidentified person." He recommended that the Company install a lock on the side door so employees would have to punch out when they left the property. This document contradicted Peraino's testimony that the lock was needed because one employee in particular was coming back into the building on his off shift to deal marijuana.

B. Managers' Interactions with Employees

According to Peraino, in order to evaluate management, the consultants walked around the building, engaged in physical observation and talked to employees to ascertain their issues and concerns. They discovered problems in leadership, in particular distrust of DON McCormick and the ineffectiveness of the director of human resources (HR), both of whom were fired on October 31. The consultants recommended that management be more visible to employees and develop rapport with them. As a result, Weir implemented a program whereby department heads would come in on their off time, on different

[2] 7 a.m. to 3 p.m. (first shift); 3 to 11 p.m. (second shift); and 11 p.m. to 7 a.m. (third shift).

[3] All meetings hereinafter took place there unless otherwise indicated.

shifts and times, and walk through the building, get to know employees, offer them assistance, and find out their concerns.

Weir testified that he personally followed these steps, the staff sometimes asked for linens or towels, and he got them. There is no evidence he had ever done this before. Golden testified that she came in on her off time to talk to employees. Additionally, she distributed the literature and spoke to employees about it. She personally observed department directors, UMs, and administrative business employees on NBI, where she was the UM. She explained that because the neighbors in that unit are more easily agitated, stimuli are kept low, and the policy is that only persons assigned to the unit should be there.

LPN Leonard worked for the Respondent for 12 years prior to her voluntary resignation in January 2020. She testified consistently, credibly, and in detail, and her testimony was not necessarily inconsistent with the above testimony of Peraino and Weir. I therefore credit her and find as follows.

From late October until she quit, department heads stood by the time clock on a daily basis when she arrived to punch in for her 3 p.m. shift. They engaged in no conversation. During this same period, two or three department heads or UMs came each night between nine and ten and either just walked through the unit or asked if the staff needed anything. She considered the department heads' presence as "really odd" because they normally worked dayshift and could not help her with patient care, including medications and treatments (Tr. 128). Among them were department heads of maintenance (Walters), housekeeping (Steve Winters (Winters)), dietary services, and respiratory services. They did not typically come onto the unit in their normal course of duties, and Leonard could recall no prior occasions when any department heads or UMs from other units came and offered to help with her work.

Leonard further testified about an incident on the afternoon of November 12, when she was called to a meeting with Peraino and three other consultants, DON Carchidi, ADON Cole, Walters, Winters, and HR representative Andrew Bennett.

Neither Bennett nor Walters were called as witnesses, and I have already stated why an adverse inference Is appropriate. Furthermore, Carchidi and Cole did not testify about this incident. To the extent they were not questioned about the event to which Leonard testified, I draw an adverse inference. See *Daikichi Corp.*, 335 NLRB 622, 622 (2001); *Colorflow Decorator Products*, 228 NLRB 408, 410 (1977), enfd. mem. 583 F.2d 1288 (5th Cir. 1978). Thus, only Leonard and Peraino testified about the meeting, and I credit Leonard's account, as follows, over Peraino's less plausible version.

Leonard sat in the middle during the meeting, which lasted 30–45 minutes. Peraino asked if she knew why she was there. She replied no, and he said that they knew who she was. He pulled out her employee badge picture and stated that they had four statements of her harassing the housekeepers about union activity, as well as her on video.[4] Leonard denied it, saying that she did not even know the housekeepers. Winters stated that four of his staff members had come to him and said they felt threatened by Leonard, who was forcing the Union on them. Leonard denied this. Walters then said that they had her on video. Leonard asked Peraino to see the footage and the statements, but he replied that she was not going to see anything. Peraino accused her of being a despicable nurse for harassing people about union activity. He stated that she could participate in union activity but not on corporate time and that the Union could not protect her nursing license. She asked if he was threatening her license, and he replied no, he was just letting her know. I note that the Respondent at trial produced neither statements nor a video; the video was encompassed by the General Counsel's subpoena, but the Respondent's counsel represented that no such video could be found.

Peraino testified that when he told Leonard a neighbor had complained about her saying the facility was short-staffed, jeopardizing patient care, she responded, "So what. I can do that if I want to." (Tr. 821). He also testified that after he told her this caused patients anxiety, she responded they had a right to know. I highly doubt that Leonard would have had the temerity to so respond when she was being verbally attacked before a group of managers and consultants that included the head of nursing.

Tara Golden

A. Employment

Golden was an RN charge nurse from October 2014 until her promotion to UM of NBI in August 2018. See R. Exh. 31. As UM, Golden worked four 10-hour shifts and was salaried at $33.50 an hour.

NBI, a 20-bed lockdown unit for residents who require behavior interventions, is the only unit for which state law requires a specific policy. The policy (R. Exh. 30) states that NBI serves "individuals whose severe behavior cannot be managed in a less restrictive setting" and "who are a danger to themselves or others and who display violent or aggressive behaviors. . . ."

The policy provides that the NBI management team includes a nurse UM, who is responsible for the day-to-day management of the unit and program to assure compliance with state regulations. All staff assigned to the unit report directly or indirectly to the UM, who has authority to direct them. The UM reports to the DON.

R. Exh. 24 is the UM job description. The area of supervision is described as responsibility for "supervision of total care of neighbors on the unit. Schedules RNs, LPNs and CNAs to adequately cover the unit." The job summary includes providing "supervision, management, support and leadership for nursing personnel. . . ."

Testifying about the role and duties of UMs in 2019 were Golden; Carchidi, who was ADON and then DON in 2019;[5] and Boice, who was a UM for about 7-1/2 years prior to her promotion to ADON in August 2020. I give Boice's testimony the most weight. She has had by far the most experience as a UM at the facility and testified credibly. Golden was new to

[4] Peraino testified that the housekeeping department is contracted out and its employees not employed by the Company.

[5] She became acting DON when McCormick was fired on October 31, and later became DON.

the position and may not have been fully aware of the extent of her authority, but her testimony about her responsibilities was truncated, leading me to believe that she was reluctant to fully detail them; and Carchidi was not a consistently reliable witness.

None of them testified that UMs had any role in hiring, scheduling (a function of the scheduler or the DON), transferring, granting overtime or time off, or approving sick leave.

The role of UM in 2019 was to oversee the entire unit: the nursing staff; employees from the CSS, activities or recreation, and program specialist departments who came to the unit; and neighbors. Duties included receiving reports from the prior shift and touching base with the incoming staff to ensure that their assignments were correct; making rounds on the unit to ensure that neighbors were safe and the staff was performing; checking the paperwork of LPNs to make certain that they were properly administering and documenting medication; and overseeing any "code rainbows," called when a neighbor exhibited violence or agitation. The recreation department supervisor had an office on NBI. The supervisors for the other departments visited the unit every day on every shift but maintained no constant presence.

The Respondent treated Golden as a manager/supervisor. Aside from the consultants' meetings, she attended various managements meetings, including the daily 8:30 a.m. meetings Weir held with all department heads, as well as special meetings he called. See R. Exh. 25, emails announcing such meetings; see also R. Exhs. 26, 27, management notifications Golden received from Weir.

Prior to February, Golden made recommendations for new safety measures in NBI, which the Company later implemented (R. Exhs. 32, 37, 38). By a May 15 email,

she advised department heads that, due to safety concerns, neighbors would not be allowed scheduled phone calls when only two CSS workers were on the unit (R. Exh. 35). Golden emailed managers on July 10, reminding them that their staffs should fill out the break sheet for lunch and 15-minutes breaks and not use their cell phones on the unit, as per company policy (R. Exh. 34). In a November 7 email to staff, Golden directed that a returning RN, who was transferred out of NBI for inappropriate behavior, should not be allowed in the NBI or have contact with its neighbors (R. Exh. 41). However, Golden testified without contradiction that she issued the email at Carchidi's direction.

Progressive discipline is practiced although not contained in the employee handbook (R. Exh. 23). As reflected in disciplinary reports of record (e.g., R. Exh. 18), the levels are re-education, verbal warning, written warning, suspension, and termination.

Golden's testimony on her authority to issue disciplines was confusing. She testified that if she had an issue with a nursing employee, she went to the nursing supervisor and that she never issued any counselings or oral or written reprimands on her own but did so only at the direction of directors or supervisors or HR. However, she also testified that she used a template for write-ups, presented them to employees to read, and then handed them to HR. She testified that she played no role in disciplining employees from other departments who came on NBI but conceded that if she had problems with them, she had discussions with their supervisors.

Boice testified that in 2019 she had the authority to issue write-ups to nursing staff and to write up CSS or activities staff, have them sign them, and then notify their directors. The Respondent submitted no documentation to corroborate her or to rebut Golden's assertion that she never did, but U. Exh. 3 contains disciplinary reports issued to LPNs for derelictions regarding the administration of medication. The job titles of the supervisors who issued them are not stated, although at least some of them were apparently UMs—then UM Pope signed one on March 8 (at 17). Boice further testified that if she wanted to skip a step in the disciplinary process, she consulted with the DON and HR.

The extent of Golden's authority to issue or effectively recommend discipline is complicated by the fact that, according to Carchidi, DON McCormick had to approve a UM's issuance of discipline or suspension and that Carchidi announced a change in this policy in the first week of November when she assumed the role. Golden was discharged on November 20, only about 2 weeks later. However, it is noteworthy that Carchidi gave this testimony in connection with Todd's suspension and discharge, ostensibly to show that McCormick had treated Todd with "kid gloves" and refused to act on recommendations she be disciplined. For reasons to be stated, I do not credit that testimony.

Golden testified that she performed evaluations of RNs and CNAs as directed by HR, although she did not sign any of the eight performance reviews by UMs in 2019 contained in (R. Exh. 28). UM Pope prepared Todd's last performance review, issued on June 5 (R. Exh. 57).

Golden received no disciplines for her performance as UM of NBI.

B. Golden's Conduct at Consultants' Meetings

Golden's testimony about the sequence of events at these meetings was confusing, and her descriptions of what was said were not fully consistent. On the other hand, she testified with assurance and in considerable detail on many conversations, leading me to believe that she did not fabricate them. Any flaws in her testimony paled in comparison to the issues I have with the Respondent's witnesses, as explained below. I once more note the Respondent failed to call Camerota or Carhart. The following is Golden's credited testimony unless otherwise indicated.

C. Events of October 28–31

At the regular management morning report on October 28, Weir stated that USG would be coming in and were angry that the Union had filed something. At about 10 a.m., Golden was called back to a meeting with Camerota and three other consultants, and department heads, UMs, and office personnel (about 20 persons total). The meeting lasted about 1-1/2 –1-3/4 hours. Camerota stated that the corporation was prepared to fire all 46 CSS workers because the Company had heard that they were the ones bringing in the Union. He blamed management for the staff 's unhappiness and asked each person in the room to state who they were, where they worked, and what they had heard about employees being unhappy or for the Union.

Golden was called back in the early afternoon for an individual meeting with Peraino and Camerota and the other consultants. Camerota accused Golden of sending out a mass text message to CSS workers (during the earlier meeting), informing them that they all might be terminated because of union activity. She denied it. Peraino said that if he were her, he would try everything to find out who put her name in the text message. Golden repeated that she had not sent a text message to anyone. Camerota slammed his hand down on the table and stated that she had to prove to him she was not working with the Union. She asked how, and denied involvement with the Union. The meeting lasted 30–45 minutes.

At about 5:15 p.m. on October 28, Golden was called to a meeting in Weir's office, with Weir, McCormick, and Carhart. Weir stated that she was suspended pending an investigation of her unionizing and sending out the text message to the CSS. She asked if this was legal and asked for something in writing. Weir answered that it was legal and she did not need anything in writing.

Weir testified Golden was suspended because, at the meeting earlier that day, "[S]he once again, after having been told repeatedly that we could not do those kind of things, identifying staff . . . who were part of the Union or not part of the Union . . . she did it again . . . . and was once again saying, well, I talked to this person and they are not part of[sic] Union, and that kind of behavior." (Tr. 385). However, Peraino and Carchidi gave the date Golden first engaged in such conduct as occurring after she returned from suspension, and Cole did not testify about Golden ever doing this.

On October 30, McCormick called Golden and informed her that she was not losing her job and to come in the following morning to meet with Weir. Weir testified that he brought Golden back because on further investigation, no managers reported they had actually heard Golden question staff, but the Respondent provided no corroborating evidence of any further investigation. Golden was paid for the time she was on suspension.

Golden met with Weir in his office on October 31. On cross-examination, Weir asserted that he could not recall making several statements, but the General Counsel refreshed his memory by showing him his Board affidavit and playing a tape recording of their conversation Golden had made, Based on Golden's testimony and Weir's refreshed memory, I find the following.

Weir told Golden that he was glad she was back, she had potential, and she was trying to become a better supervisor. He stated that he was worried she would have been so angry she would have quit. He further said that her name came up with regard to text messages sent to CSS during the management meeting. He told her that the consultants were professionals and did this for a living, and even though he and Carhart did not think there was anything there, she had to be suspended pending an investigation. He also told her that she was an integral part of the facility, the NBI staff was saying good things about her, and she was doing a really good job.

D. Golden's Postsuspension Conduct

After Golden's return, the first consultants' meeting that she attended was on the morning of November 4. Both Camerota and Peraino spoke. Camerota discussed what the Union could and could not do. He mentioned management rights and said that he could hold up raises for a up to a year while a contract was being signed. He gave out literature that managers were supposed to ["audio interference" at this point in the transcript] staff about. Management was to send only staff whom they thought were not for the Union to the administrative conference room to watch a PowerPoint presentation. Camerota and/or Peraino requested that staff come in on their off shifts and monitor the staff or ask them if they needed any assistance:

> But you didn't have to give any assistance. You were just looking for any suspicious activities. You were looking to see if anybody was gathering in groups. We were looking to see if – when we walked by, if they stopped speaking or if they continued speaking. We were looking to see if any [audio interference] that were not job related. And they asked us to hand out literature and talk with the staff about the literature. (Tr. 61–62).

Further, Peraino or Camerota said that union meetings were being held in Angela's Pizza. and it was not illegal for managers to go public places such as restaurants and see if people were organizing or having meetings, overhear what they were saying, and report back what they heard. Managers were given times union activity might be happening and good times to come in and ask staff if they needed help, while observing if they gathered in groups or engaged in nonjob-related activities.

On November 4, after the conclusion of the afternoon management meeting, Golden was called to Weir's office. Camerota, Weir, Carchidi, and Carhart attended. Camerota stated that Golden was special because he did not bring people back from suspension, but through Weir's advocacy, he had looked deeper and found out she was a green or new manager and had not been properly oriented.

Camerota said that she was either a greater actress, a great liar, or clueless, because the people she had said were not for the Union, he had as for the Union. Comorata went on to say that she was no longer allowed to state whether or not employees were for the Union but to report body language, eye contact while she was talking with them, whether they crumpled up the consultants' literature, and if they spoke to anyone after she spoke with them about the literature. I note here that Golden did not testify about an earlier occasion when she had stated at a meeting that certain people were for the Union, leading me to believe that her recollection of the sequence of events was confused.

At a meeting later the week of November 4, Camerota asked if she had anything to report. She mentioned employee "S.N."[6] and what happened when she spoke to him about the literature (body language, etc.). Camerota responded that was how to report.

The week of November 11, Golden stayed after an afternoon consultants' meeting ended. In the presence of the consultants,

[6] I will use initials for employees in the interest of protecting their privacy.

Cole, and several other UMs, she stated that the staff was afraid to come inside the building and talk, and LPN "N." (Golden did not know her last name) felt it was a witch hunt and people were being bullied.

Peraino suggested that employee N. was for the Union. Golden replied that was ridiculous; just because people were not for corporate at the time did not mean they were prounion, and N. was just expressing her feelings and opinion. Cole responded that the Company was holding people accountable for their actions and now that was bullying. Golden replied that people who did not need to be on the units were going there and talking to staff about the Union. The meeting lasted about 30–40 minutes.

Also the week of November 11, likely immediately after the meeting just described (Golden could not recall the actual day), Golden was very upset and was pulled aside by Carhart and Carchidi. They went to Weir's office and met for about 45 minutes. Carhart asked what Golden had to say. According to Golden, she "exploded and said, "[T]his was a witch hunt and it was ridiculous, and that people that they had for the Union were not for the Union. And that . . . there was hostility in the building." (Tr. 75). Carhart told her not to use the words witch hunt because that was not what the Company was doing; rather, they were trying to figure out who was for the Union and who was not. Carhart stated that Golden was seen handing out union cards. Golden asked where, when, and to whom, and said she had never seen a union card or had contact with the Union. Carhart asked how Golden could prove that she was not in with the Union, and Golden replied she did not know but would be unwilling to come in on her off time to monitor the staff or go to other units to monitor staff on her on time.

Carchidi testified that after she became DON, she and Carhart were at a meeting at which Golden seemed upset (apparently the above meeting). They pulled her aside and accompanied her to Weir's office, where they allowed her to vent about the unit and the staff and the difficulty she was having transitioning to management and still being friends with the floor nurses with whom she had worked. Carhart spoke to her about how to be a manager.

I credit Golden's version of the meeting over Carchidi's: (1) Golden's version was considerably more detailed; (2) it is far more plausible that after the consultants' meeting, the subject of the union would have been the focus, not Golden's work-related issues; and (3) the Respondent did not call Carhart to corroborate Carchidi's account or deny the statements that Golden attributed to her.

E. Respondent's Witnesses' Conflicting Accounts of Golden's Conduct at Meetings

Peraino testified that Golden attended many do's and don'ts sessions and that he had concerns about her "many times." (Tr. 823). However, he testified about only two specific incidents. The first was the week the Union withdrew its petition (on October 30), probably the same day. At the morning meeting, when the consultants went around the room and got feedback from managers, Golden was saying how employees would have voted, in contravention of the consultants' directive. She mentioned a specific employee by name and said that he was anti-union. Peraino asked how she knew, and she replied that she had asked him. Peraino responded that managers had been repeatedly told that asking employees those kind of questions was prohibited as unlawful interrogation.

The second time was the following week, when Golden brought a notebook to a morning meeting. She showed Peraino page-by-page five or six employees and concerns they had expressed to her. Peraino asked if she had solicited their concerns, and she replied yes. He responded that he did not know how many times he could tell her she could not ask employees what was happening, why they were upset, or how they felt. I note this testimony directly contradicts what the consultants had instructed managers to do and that, even according to Peraino, Golden did not say anything on this occasion about questioning employees about their union sympathies.

Peraino testified that after that meeting, he recommended Golden not attend any more management meetings because he thought that she was looking to undermine the Company by purposely drawing an unfair labor practice. He also testified that she attended no further meetings—contrary to Weir's testimony that she attended the afternoon meeting on November 20.

On cross-examination, Peraino testified that there were two additional occasions when Golden came to a meeting with the same kind of list regarding employee grievances, but he provided no specifics.

Weir testified that Golden "on multiple occasions" would start saying she talked to this person who was not union and talked to this person who was, contrary to the directions of the consultants (Tr. 384). He further testified that at the November 20 afternoon meeting, Golden listed the names of people who were not union and stated that she did not understand why management thought they were union. None of the Respondent's other witnesses corroborated this testimony.

Carchidi and Cole contradicted Peraino's and Weir's assertion that Golden repeatedly violated the consultants' instructions by identifying specific employees and their sentiments toward the Union.

Carchidi recalled only two incidents involving Golden. The first was in about early October, when Golden stated at a morning meeting that this person was for the Union, this person was not, and this person might be. Peraino told Golden that she could not question staff about their union deals and/or activities. The second occurred after October 31, when Golden brought a paper to a morning meeting and said that she had spoken to employees, and these were the reasons they were talking about getting a union, such as pay and benefits.

Director Cole testified about only one incident, "maybe in October," when Golden entered the room "quite aggressively," waved a notebook or piece of paper and very loudly announced, "[T]his is why they want a union." (Tr. 881). I find it highly implausible that Golden would have burst into a room filled with management and consultants in such a manner.

Thus, the Respondent's witnesses offered hopelessly irreconcilable accounts of Golden's conduct at the management meetings, and I do not believe Peraino's and Weir's testimony that Golden was so blatant in repeatedly continuing to flout instructions.

F. Golden's Discharge

On the afternoon of November 20, Golden was called to Weir's office, where she met with Weir and Carchidi. Weir stated that Golden was no longer "a good fit," did not seem to be able to make the transition into a management role, and was being relieved from her post. Golden asked what she had done wrong and what she could work on from a managerial standpoint. He repeated that it was just not a good fit, the Company was going in a different direction, and she was no longer employed. I credit Weir that Golden expressed shock at her termination.

Weir testified that prior to July, he observed that Golden was "struggling" as a UM and that she regularly came to his office to seek guidance (Tr. 376). He also testified that he received "a lot" of complaints from staff regarding how she was managing the unit (ibid). However, he related only two specific complaints, from two program specialists, both in connection with Golden's issuance of R. Exh. 41. The Respondent did not call them as witnesses or produce any documents showing any such complaints. Golden was never disciplined for anything she did as a UM.

Weir went on to testify that he did a lot of monitoring and coaching of Golden but saw little improvement in her performance. Respondent's Exh. 39 is an August 16 email from Golden to managers, with Weir and McCormick copied, in which she discussed the problems she was having as a nurse manager and asked for suggestions to alleviate employee burnout. Weir testified that after receiving her email, he arranged for her to attend a front-line supervisor/manager training course offered by an outside vendor on September 25. See R. Exh. 40. He testified that her performance as a manager did not improve after she attended the training or after she returned from suspension.

According to Weir, Golden's termination was also based on what Golden stated at consultants' meetings, especially the November 20 afternoon meeting. Thus, after that meeting, Weir and Peraino reached out to Camerota and expressed "the concern" with Golden. Weir told Camerota that he was "okay [with terminating Golden] because she just wasn't learning how to transition into a management role." (Tr. 390). Implicit in this testimony is that Peraino recommended the termination and that the primary reason was what Golden said at the meetings, not her performance. I note Weir's suspicious vagueness in testifying about a "communication" he had with Peraino and either Rinn or Camerota concerning the termination.

Carchidi recalled a conversation in her office with Golden sometime between August and October. Golden was upset and explained to Carchidi that she felt as though her visions for the NBI unit were not being realized. About a month or month-and-a-half later, they had another conversation, in which Golden expressed frustration about finding her style as a manager. Despite being the DON, Carchidi had no involvement in the decision to terminate Golden.

Golden received nothing in writing concerning her termination, which Weir testified was due to an inadvertent HR error. Weir placed a notice of termination in her record, stating that the reason was her inability to transition to her management role and her creating conflict between staff and management (R. Exh. 42.)

Weir said nothing to Golden about her termination being due to her improperly providing the names of employees who were pro- or antiunion. However, he testified "there was a frustration that she continued to do the same things that she had been educated not to do; not learning how to be a manager and to take those kind of directions regarding what we are able and could be . . . doing." (Tr. 485–486.) The record reflects no conduct to which he could have been referring other than in connection with the consultants' directives.

In May 2020, an RN supervisor who had engaged in misconduct toward a neighbor was suspended for a week and then demoted to staff nurse. See GC Exh. 16. Carchidi testified that a few months prior to the hearing, a UM was suspended, written up, and demoted to unit nurse because, at a morning report meeting, she engaged in a "verbal explosion and cursing and everything and slammed out of there. Then she went over into the café, where she continued." (Tr. 731.) Carchidi explained that she was not terminated because her outbursts occurred in nonpatient areas.

Cathy Todd

A. Employment

The Respondent employed Todd as an LPN from 2007 until her discharge on November 19. She was the sole LPN on the 3–11 p.m. shift in the NRP4 unit, a 40-bed unit averaging 35–40 neighbors.

As an LPN, Todd gave out medications and performed treatments as ordered, and dealt with behaviors. NRP4 was for more independent neighbors, who were ready to go back into the community, and the staff wanted them to come to the nurses' station to get their medications so that they would learn the times they needed to take them.

The facility's policy regarding self-administration of medication is designed to enable neighbors to be at "their highest level of independence." (R. Exh. 10.) Pursuant to policy (R. Exh. 11), medications are normally given at 5 and 9 p.m., with an hour leeway before or after the appointed time, unless physicians have ordered otherwise. Neighbors need to ask an LPN or CNA to use the phone, which is kept in a locked area.

UM Pope prepared Todd's last performance review, issued on June 5 (R. Exh. 57). Todd was rated in 27 categories—unsatisfactory, needs improvement, meets expectations, exceeds expectations, or exceptional—and received an overall rating of 82. Pope did not rate her unsatisfactory in any of them. She checked improvement needed in three: individual attitude, department/unit/shift attitude, and day-to-day supervision of others. On the other hand, Pope rated Todd as exceptional in five categories and exceeds expectations in two.

In the comments section, Pope cited Todd's taking things personally and not letting things go as weaknesses. She also noted complaints that Todd had regarding CNAs and undocumented patient behaviors. Nothing is said in the evaluation about Todd mistreating neighbors. Under strengths, Pope stated "organized, dependable, reliable."

Todd testified that prior to November, she was never suspended, and she recalled no prior disciplines. The Respondent

produced no evidence to show that she ever received any prior discipline, and I find this as a fact.

B. Union Activity

Todd was engaged in union activity from the start of the organizational campaign in June until her discharge. She talked to coworkers; attended meetings at different places, including Angela's Pizza and the ice cream parlor across the street from the facility; and handed out flyers and authorization cards on the road leading to the facility at shift changes. Leonard testified that in June, Todd approached her and asked if she was interested in joining the Union.

About a week after the first union meeting, Todd was in the dining room during dinner when UM Katrina Collenton approached her and stated that she had heard there was a meeting about the union and Todd was there. Todd responded yes, and Collenton asked why. Todd answered that she wanted to know if they could help.

Soon afterward, in approximately July, Todd had a conversation with her UM, Pope, in NRP4. Pope asked her why she supported or was interested in the Union. Todd replied that the employees needed help in getting raises and better health insurance. Pope responded that the health insurance would never change and there would be no pay raise. Todd replied that was why employees needed the Union. Pope professed not to recall any conversation with Todd about the Union, and other aspects of her testimony were not believable. I therefore credit Todd's account.

Todd testified that she had several conversations with Carchidi. She specifically recalled a lengthy one a few days after McCormick was fired on October 31. When Carchidi had stopped by the unit, they discussed McCormick's termination, and Carchidi stated that the Union was to blame. Todd disagreed. They also discussed why Todd had gotten involved with the Union.

On direct examination, Carchidi testified to one conversation about the Union with Todd, occurring on NRP4 when Carchidi was ADON. Todd stated that she was going to educate herself about the Union, and Carchidi replied education was always a good thing. On cross-examination, Carchidi repeated that they had only that one conversation. After being shown her Board affidavit, Carchidi still professed not to remember others, and the General Counsel then read the following paragraph into the record (Tr. 721):

> LPN Cathy Todd talked to me about the Union . . . when I was the ADON a few times when I was supervising at night. . . . I believe they were in about the late summer. . . . IMs. Todd told me she had gone to a Union meeting, because she wanted to find out what it was about, that she wanted to be educated. On one occasion, she mentioned a struggle with her health insurance. . . . Once she mentioned something to me about LPNs feeling targeted by supervisors.

Carchidi was evasive, and contrary to the Respondent (R. Br. at 31), I find that she was impeached by her affidavit. I therefore credit Todd's credible testimony over hers.

Weir admittedly knew at the time of Todd's termination that she was a union supporter.

C. Events Leading to Todd's Suspension and Discharge

In the course of meeting with individual managers, Peraino concluded that one of the biggest problems was DON McCormick's favoritism. Thus, Peraino testified, McCormick had a list entitled "untouchables," naming eight employees who apparently could never be written up. He further testified that McCormack admitted there was a list of her favorites, "and her people can come and go as they please." (Tr. 804). No such list was put in evidence, and I find Peraino's testimony highly implausible. If McCormick did in fact engage in favoritism toward certain employees, I can think of no reason why she would have needed to put it in writing, and I seriously doubt that she would have so crassly admitted to such conduct. I therefore discredit this testimony.

Carchidi testified that after she took over as acting DON on October 31, she discovered McCormick had not acted on about 10–15 written disciplines supervisors had submitted to her, including complaints against Todd. Carchidi issued no disciplines as a result.

Pope testified that she had concerns over the past couple of years with Todd's "attitude and abrasiveness in the way she spoke" to some of the neighbors (Tr. 506). See R. Exh. 8 at 1, dated March 5, 2018, her notes of complaints from one neighbor about Todd. The Respondent's records show nothing about Pope ever acting on any such concerns.

Pope further testified that in October, she overheard Todd yell at a neighbor, and prepared a write up. She met with Todd, in the presence of Social Worker Britton-Schrager, to present it. However, Britton-Schrager offered no testimony about such a meeting, and Todd did not recall it. Pope averred that when she met with Todd, she was not able to issue her the write-up because Todd adamantly denied the allegation, slammed things, and stormed out. Pope took no further steps to issue the write-up, which later mysteriously disappeared from her office. I cannot believe that had Todd engaged in such egregious conduct, she would not have been further disciplined for insubordination. I would also expect that Britton-Schrager would have recalled such a dramatic meeting had it occurred. I therefore discredit this testimony.

Britton-Schrager did testify that in February 2019, she observed a neighbor was very upset and asked her why. The neighbor replied that Todd had embarrassed her in front of other neighbors, and Britton-Schrager prepared a progress note relating what the neighbor said (R. Exh. 8 at 3, dated February 14). It does not mention Todd by name. In late October, a neighbor reported to Britton-Schrager that Todd had refused to give her medication in her room because Todd said she was able to walk to the nurse's station. Britton-Schrager typed up a statement from the neighbor (ibid at 2, dated October 30). No disciplinary action was taken against Todd as a result of these incidents.

The circumstances of when and how CNA Lewinson came to prepare R. Exh. 1, an undated statement reciting her complaints about Todd's treatment of neighbors, are murky because the Respondent's witnesses were confusing on its genesis and vague on details.

Lewinson first testified that "between October and November," she observed Todd's "foul behavior" toward neighbors and reported it to Pope, who asked her to write down everything, and she did so (Tr. 493–494). However, on cross-examination, she testified that "one day," Pope brought up Todd's name—she could not remember how—and Lewinson made "a gesture." (Tr. 495). Pope asked what was going on, Lewinson described Todd's behavior. Pope, on the other hand, testified "[s]omething had happened at the nurse's station, and this CNA [Lewinson] was there. And it was something that was said by Cathy." (Tr. 512).

In any event, Lewinson prepared R. Exh. 1 at Pope's request. When it came to Weir's attention, he immediately started an investigation by asking Carchidi and Cole to interview two of the neighbors whom Lewinson identified.

Carchidi and Cole talked to several residents and decided that further investigation of Todd was needed. See R. Exh. 2, Carchidi's November 12 notes of interviews with several neighbors. Residents raised issues related to Todd's providing food, providing medications, and general treatment.

Cole testified that following these interviews, she reported to Weir that what the patients had reported was abuse under state Department of Health (DOH) regulations and that Todd therefore should be suspended immediately. See R. Exh. 12, the DOH incident reporting manual, which she referenced in her testimony. She expressed her opinion that Todd should be terminated immediately for engaging in "a very high level of abuse. . . . It's horrible." (Tr. 875).

D. Todd's Suspension

On the afternoon of November 13, Todd returned a voice mail message from Carchidi. Either Weir or Carchidi stated that Todd was being suspended pending further investigation for the way she treated patients, including the way she spoke to them about the way they ate, removed food from a neighbor's tray or withheld food, embarrassed them before other neighbors, and talked on her cell phone but denied a patient a phone call during medication pass. Todd denied the accusations. She responded that UM had a rule that neighbors could not use the phone during medication pass because it was distracting. Both Weir and Carchidi testified that Todd declined his offer to come in and write a statement, but Carchidi's one-paragraph summary of the call (R. Exh. 3) says nothing about this.

E. Further Investigation

According to the Carchidi, after the suspension, she and Pope spoke with various staff, including CNAs Lewinson and Kristina Plonski (Plonski), who worked with Todd. They concluded that there were issues with Todd's giving medications and her withholding of food. See R. Exh. 4, Pope's November 13 statement regarding (1) her interviews with Lewinson ("last week")[7] and Plonski (that same day), (2) patient complaints from two neighbors regarding denial of medications and phone calls, and (3) Pope's own observations. See also R. Exh. 5, Carchidi's November 13 notes of her conversation with Plonski.

Pope prepared another statement on November 14, on the results of her interviewing neighbors regarding whether Todd was administering medications in the appropriate time frame (R. Exh. 7).

On November 13, social workers interviewed neighbors, about Todd's conduct. Britton-Schrager reported to Carchidi that several complained about their medication and general treatment, with food being a big issue.

The social workers next interviewed neighbors using standardized forms. R. Exh. 6 consists of the interviews of 37 neighbors. At least 34 interviews were conducted on November 13 (one form is undated), and two on November 14. One question was "Have staff ever yelled or been rude?" Six of the 37 responded yes:

(1) Kathy [Todd] a few times (p. 1).

(2) A CSS person with reddish hair. In the margin in a different handwriting, is a negative comment about Todd (p. 3).

(3) A nurse (p. 9).

(4) "Cindy Pope treats me like individual asshole." (p. 29).

(5) Judy ("I've complained about it [cut off].") (p. 31).

(6) Katie [may or may not have been Todd] (p. 33).

Other negative comments were (1) Todd would not let him/her use phone (p. 6); (2) Pope switched roommates without consulting people (p. 12); (3) Pope showed favoritism (p. 30); and (4) when a male nurse entered the room, he says "What a fuckin' mess." (p. 67).

Carchidi did not follow up in any way on the complaints against staff members other than Todd, or discipline them.

What is peculiar is that Todd was suspended pending further investigation on the afternoon of November 13, yet Pope's recitation of patient complaints, her own observations, and her interview with Plonski are also dated November 13. Similarly, almost all off the social workers interviews with patients were dated November 13. I must conclude that the "further investigation" was already initiated and at least substantially completed **before** Todd's suspension. I further note Weir's testimony that he became aware of Todd's supposed medication errors only after her suspension and therefore never confronted her with them. If such was the case, one has to ask what purpose the "further investigation" served.

F. Discharge

Based on all of the above described incident, Weir and Carchidi decided to terminate Todd because the investigation revealed that she had a "long history" of mistreating neighbors in various ways (Weir at Tr. 324). On November 19, Carchidi, with Weir present, called Todd and asked her to come in that afternoon. She met with them in Weir's office.

Todd became very emotional on direct examination when the questions turned to her discharge, requiring a brief break before

[7] This was before Todd's suspension, contrary to Carchidi's testimony.

she regained her composure. I therefore reject the statement in Weir's summary of events (R. Exh. 14 at 2) that when he informed Todd of her termination, "[S]he did not appear surprised or upset."

It is undisputed that Weir told Todd she was being terminated because of what he had learned from the investigation regarding multiple complaints, whether he mentioned only complaints from coworkers (Todd) or complaints from both coworkers and neighbors (Weir). Todd denied any misconduct. I believe that Todd became emotional at the termination interview and might not have accurately heard everything Weir said. I therefore credit Weir and Carchidi and find that Weir stated that Todd's treatment of patients could rise to the level of being reportable to the DOH, as opposed to Todd's testimony that Weir stated he would be reporting her to the nursing board.

Weir never reported Todd to any state licensing authority. However, Cole, the director of medical records and legal liaison, testified that the administrator or DON is required by state law to report suspected abuse to the DOH, and Weir confirmed he had such a responsibility. Weir testified he did not do so because Todd was terminated and could no longer harm residents of the facility.

Todd later received an undated termination letter stating that her employment ended on November 19 (Jt. Exh. 5). It set out no reasons for the termination. Weir's entry in Todd's personnel file states "[i]nappropriate behavior" to residents (R. Exh. 13), and his summary of the investigations of Todd lists incidents of alleged patient abuse (R. Exh.14). Neither mentions medication errors.

U. Exh. 3 contains 14 disciplines issued to LPNs, ranging in date from June 3, 2016 to December 17, 2020, most for derelictions in administering medications. Two were re-educations, nine were verbal warnings, two were written warnings, and one did not specify the level of discipline. An LPN was terminated on November 11, 2020 for physical and verbal abuse of a patient (R. Exh. 15).

Josh Endy

A. Employment

The Respondent employed Endy from September 2014, until his discharge on November 11. In May 2017, he was promoted from shift CSS worker to a CSS supervisor and received a pay raise from $11.27 to $13.50 per hour (R. Exh. 19).

On the night shift in 2019, Endy and Cruz were the two CSS supervisors. The only other supervisor at the facility was the nursing supervisor, who was the highest ranking official on site. DeAbreu was available to come in if Endy or Cruz needed his assistance. When both Endy and Cruz were on shift, they considered her the lead supervisor, although she was not formally designated as such. Because they worked alone on weekends, Endy was the only CSS supervisor on duty at least two shifts a week.

The job description for a CSS supervisor (R. Exh. 17), includes such functions as addressing coverage concerns on all posts and shifts, assigning shift CSS to unit tasks, monitoring their performance during code rainbows or therapeutic interventions, covering their assignments when necessary, assisting in scheduling adjustments and attendance, and in-service, disciplinary reports.

Endy, Cruz, and DeAbreu all testified about the position of CSS supervisor on the night shift. Much of their testimony was substantially consistent. DeAbreu was often vague in his answers and failed to address specific situations. Cruz has been CSS supervisor since about 2014 and on the night shift since about 2015. She thus has the most direct familiarity with the role, had no incentive to either overstate or understate the scope of Endy's responsibilities, and appeared candid. I therefore give her testimony particular weight.

The CSS supervisors played no role in hiring, evaluating, or transferring employees from shift-to-shift; or in granting promotions, vacation requests, bonuses, or wage increases.

DeAbreu made out a weekly schedule of which employees would be working each night. Cruz and Endy had no authority to make any modifications to the schedule. They had the responsibility to assign staff to particular posts at the beginning of each shift. See R. Exh. 44, assignment and break sheets Endy filled out in 2019. Endy's estimate of how long this took him struck me as unreasonably low. I credit Cruz that it took approximately 10–15 minutes to fill out the assignment sheet if everyone showed up on time and no one called out, otherwise 30 minutes; and that bringing the sheet to the nursing supervisor to review took another 15 minutes or so.

The forms listed five assignments or posts in NBI (including CVOs and 15-minute checks), eight assignments in other units, and one front desk position. Depending on neighbors' needs, not all the posts were filled each night. Usually, there were seven to ten CSS staff, including Endy and Cruz, on the shift. Both Endy and Cruz regularly assigned themselves or each other to perform assignments that CSS staff also performed. Endy frequently filled out the assignment and break sheets at the start of the shift and paperwork at the end of the shift because Cruz would come in late or leave early, or otherwise ask him to do so. If neither supervisor was working on the shift, the nursing supervisor or a CSS employee with seniority made the assignments. See GC Exh. 7, assignment and break sheets CSS employee Anita Rogers signed in September and October. If needed, DeAbreu came into the facility to perform this function.

During the shift, the CSS supervisor notated breaks and any changes in assignments. At times, the nursing supervisor informed them a CSS employee was needed for an extra CVO, requiring them to adjust assignments depending on who was available. At the end of the shift, either Cruz or Endy filled out shift-to-shift forms for the incoming shift's supervisors. See R. Exh. 45, forms that Endy filled out in 2019. They listed any codes that were called, any changes in patient status, and any staffing issues—calls outs, lateness, or disciplinary actions. They also submitted supervisor's daily shift reports. See R. Exh. 58, reports from 2019 that Endy signed.

Endy testified that none of the CSS positions required special training or education, and Cruz stated that all of the CSS staff were capable of working in NBI, the most demanding unit. Endy placed CSS workers in posts that they requested or where he felt they were comfortable or good. He explained that certain CSS workers developed bonds with certain neighbors, most

of whom were long-term for a period of years. On the other hand, some staff did not get along with certain neighbors. Moreover, some newer workers and female workers were uncomfortable in the NBI unit because of the nature of its neighbors, so Endy assigned experienced employees or those who wanted to work there.

Cruz testified that she uses similar criteria in making assignments. She tries to rotate assignments, some of which are more physically demanding or are with particularly difficult neighbors, unless an employee wants a particular post. She sometimes has to assign employees to positions that they do not want and has had occasion to reassign CSS staff to different positions because they were not up to performing certain work. She considers the behavior of a neighbor in deciding whether a staff member of the same gender should be assigned to the neighbor's CVO.

Nothing in the record suggests that the assignments staff received had any impact on their pay or other terms or conditions of their employment.

In 2019, Endy or Cruz were short staffed on a regular basis, including every weekend. They determined when the shift was short staffed and could then ask a CSS worker on the previous shift to stay over (and receive overtime pay) but only a voluntary basis. They knew from DeAbreu which employees had worked too much and should not be asked but could decide which other employees to ask. If DeAbreu was going to be away, he told them that they could fill out and approve an authorization for an employee to stay over. See R. Exh. 55, authorizations Endy signed in August. He filled out a total of 10–20 overtime authorizations during his tenure as a CSS supervisor. Cruz testified that she could approve on her own an employee staying over, and Endy could recall no occasions when DeAbreu disapproved his approval of such.

Endy testified that DeAbreu told him and Cruz to write up employees who had a certain number of tardies and turn the forms in to DeAbreu, who would deal with them. He further testified that on one occasion, he reported to DeAbreu that a CSS employee had been caught sleeping but did not make a recommendation. He and DeAbreu met with the employee to deliver the discipline. In several shift-to-shift forms (R. Exh. 45), Endy wrote in "write-ups" in the discipline box, but it is unclear to what they referred, and their ultimate disposition. In this regard, Endy did not know of any instances where DeAbreu acted on recommendations that he made for write-ups. Endy testified that he signed R. Exh. 52, an April 2018 disciplinary report for a no call/no show but filled it out at DeAbreu's direction.

Cruz testified that she has also written up employees for no call outs, lateness, and sleeping on the job but needed DeAbreu's approval of those write-ups. Because her testimony on how often he has disagreed with her recommendations was unclear, I cannot make a finding thereon. She first stated "he does tend sometimes to disagree" but then said he disagreed with her "maybe about" 25 percent of the time (Tr. 779–780). In those situations, she immediately notified DeAbreu. They discussed the incident, together met with the employee to get his or her side, and then decided the extent of discipline to be imposed. There is no evidence DeAbreu ever engaged in further investigation of the incidents that Endy or Cruz brought to his attention.

R. Exh. 18 is comprised of illustrative disciplinary reports that CSS supervisors on other shifts wrote between December 28, 2018 through December 19. DeAbreu's involvement in their issuance is unclear. Cruz's testimony indicated the disciplinary reports are retained by CSS even when discipline is not actually imposed so whether DeAbreu actually followed through with discipline in those cases is unknown.

R. Exh. 48 is DeAbreu's October 30 performance review of Endy. It is difficult to read, but DeAbreu apparently referred to Endy's decision-making as a weakness. However, Endy's only unsatisfactory rating was in appearance/attitude, and he was never disciplined for failures of the CSS employees on his shift. Cruz testified that DeAbreu has verbally counseled her on how to better handle CSS staff situations, such as their clocking in and out for their 15-minute breaks or their properly completing paperwork, but there is no evidence that these counselings were reduced to writing or that Cruz suffered any actual or potential consequences as a result.

Endy testified that he did not attend any supervisors' meetings, and he did not recognize R. Exh. 47, an email inviting him to attend a CSS supervisors meeting on January 3 and his response. DeAbreu further testified that he held a meeting with the CSS supervisors in October or November but could not recall the date. Even fully crediting DeAbreu, any CSS supervisors meetings were rare. Neither Endy nor Cruz were invited to attend the consultants' meetings.

The Respondent produced no records to show that Endy received any disciplines prior to November 11, and I find that he received none.

B. Union Activity

Endy was involved in union activity from August or September until after his discharge. He handed out authorization cards and collected them; talked to employees in favor of the Union; and attended gatherings at Angela's Pizza, during shift changes, and on the side road.

C. Suspension and Discharge

On the morning of November 11, Peraino exchanged a series of emails with Camerota and Rinn (GC Exh. 15). In the first, with the subject "Josh in CSS3," Peraino wrote, "He is a supervisor. Wearing a t shirt to working[sic] and listening on headphones to his cell phone while working. . . . you can terminate asap. He is not part of the union at all. . . . "

Rinn responded, "He has been the topic of many conversations lately. I'll talk to Patrick." [Weir].

Peraino sent a second email, stating, "He is blatantly anti company[sic] and breaking every policy. Not a supervisor."

Camerota replied, "If he is not following our philosophy, please feel free to relieve him of his duties today."

Peraino offered no testimony regarding these emails and, as previously stated, the Respondent did not call Camerota as a witness. On their face, these emails show that the Company had made the decision to discharge Endy prior to the meeting Peraino and DeAbreu held with him on the evening of November 11. They undercut DeAbreu's testimony that he made the

decision to discharge Endy because of his aggressive actions, insubordination, and disrespectful manner during the meeting itself.

Peraino testified that he had previously received complaints from a CNA and a CSS worker that Endy was coercing them into signing union authorization cards; the CNA further complained that Endy did not follow the dress code but insisted CSS workers did. Neither of these employees testified, and the record contains nothing in writing from them. Peraino further testified that he asked DeAbreu to schedule a meeting with Endy because Endy had solicited union authorization cars and could not do that as a supervisor.

Endy, DeAbreu, and Peraino all gave accounts of their November 11 meeting. I credit Endy's version of what was said for the following reasons:

(1) The above emails earlier that day.

(2) Endy's account was quite detailed, and I do not believe he fabricated it.

(3) DeAbreu testified that he relieved Endy of his duties when Endy threw his badge on the table; however, Peraino testified that nothing was said at the meeting about Endy being suspended or discharged.

(4) Both DeAbreu and Peraino testified that after Peraino told Endy he could not engage in union activity as a supervisor, Endy became "aggressive" and stated, "I don't need this fucking job" (Tr. 634, 815), before he threw his badge at them, and stormed out of the room, slamming the door and damaging the wall.

Weir testified that DeAbreu and Peraino related to him this alleged statement, which is included in Weir's summary of the incident (R. Exh. 49) but inexplicably appears nowhere in the statement DeAbreu prepared at Weir's request regarding the meeting (R. Exh. 20). Such statement, if Endy made it, would have been highly relevant to any assertion that Endy engaged in inappropriate behavior.

In contrast, I find more plausible Endy's testimony that Peraino used obscenity, as described below. I note that Endy's description of Peraino's attitude during the meeting comported with Kelly's depiction of his bullying tone during her November 11 meeting with him.

(5) I further find implausible DeAbreu's testimony that after Peraino stated that Endy could not pass out cards because he was a supervisor, Endy replied, "Keith, who[sic] you think you are to tell me that?" (Tr. 633). Nothing in the record suggests that Peraino and Endy were on a first-name basis, and I have a problem believing that a first-line supervisor would have been so crass in his response.

(6) Finally, Peraino testified that after Endy slammed the door on his way out, he told Endy that between throwing the badge and slamming the door (hard enough to cause damage), this was workplace violence. Conceptually, I cannot see how Peraino could have told Endy this after he left the room.

Based on the above, I find as follows. At the start of the meeting, Peraino asked Endy if he knew why he was there, to which Endy replied no. Peraino stated that it was his union activity, his handing out union authorization cards was illegal, and the corporation was going to sue him. Peraino asked him something, but when he started to answer, Peraino said to "shut the fuck up," he did not want to hear it. (Tr. 205). During the meeting, Peraino asked why Endy wanted a union and if he liked his job. Endy responded that he was trying to make it better and safer. Peraino stated that if he did not like his job the way it was, why didn't he "fucking" leave? (Tr. 208). Endy responded, "[B]ecause I need my job. I have a family to support." (ibid). Peraino continued asking questions, including if Endy knew who else was handing out cards. Endy replied that he would not answer. Peraino asked DeAbreu if this (Endy) was whom he really wanted to be the supervisor on the overnight shift. Peraino next asked DeAbreu what was going to happen, and DeAbreu replied suspension pending investigation.

Endy testified that he "slid" his badge across the table and that the door was hydraulic and "barely" hit the wall as he left (Tr. 208). However, Endy conceded that he was upset, which would have been understandable under the circumstances, in particular Peraino's tone, and I think that he understated his conduct. On the other hand, I believe that Peraino and DeAbreu exaggerated what Endy did. The most likely scenario is that he threw his badge on the table and not at them and then forcefully threw open the door on his way out, causing a small dent in the wall. See R. Exhs. 21, 22, photographs taken the following day. DeAbreu escorted him out of the building.

Peraino and DeAbreu separately called Weir that evening and related what had occurred at the meeting. Weir directed DeAbreu to write a statement, which DeAbreu did (R. Exh. 20.) Weir later wrote up a summary of the meeting based on what Peraino and DeAbreu told him (R. Exh. 49, which is undated).

No further investigation was conducted, and Endy was mailed a notice of termination dated November 27, effective November 11 (Jt. Exh. 4). It set out no reasons. In a November 25 email to Peraino and Weir, Rinn stated that Endy's throwing his badge and walking out was viewed as his resignation (GC. Exh. 13).

Posted Letter About Wage Increases

The Company has had a history of granting employees annual across-the-board wage increases with the exception of 1 year when it was delayed a few months. They were apparently given at the end of the year, and many staff members came to Weir inquiring whether they would get one at the end of 2019.

On December 19, the Respondent posted on the bulletin board a letter addressed to all staff (Jt. Exh. 6; GC Exhs. 2, 3). The subject was "wage increases," and it began, "Over the past few weeks, many employees have approached us about wage increases." The letter went on to state that the Union had filed unfair labor practice charges, described them, and concluded, as a result, "[E]verything is frozen. . . . [W]e are in a stalled mode." The letter continued to be posted at least into early January 2020.

Analysis and Conclusions

8(a)(1) Conduct

(1) Surveillance

Although the General Counsel does not specifically allege surveillance, it is closely related to the subject matter of the

complaint (impression of surveillance) and has been fully and fairly litigated. I can therefore consider it as the basis for finding an unfair labor practice. See, e.g., *Securitas Security Services USA*, 369 NLRB No. 57, slip op. at 1 (2020); *Wal-Mart Stores, Inc.*, 368 NLRB No. 146, slip op. at 1 fn. 3 (2019); *Pergament United States, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

The test of whether an employer has unlawfully created the impression of surveillance is an objective one, i.e., whether under all the circumstances an employee could reasonably conclude from the statement or conduct in question that his/her protected activities were placed under surveillance. *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527, (2007), quoting *Flexsteel Industries*, 311 NLRB 257, 257 (1993); see also *Consolidated Communications of Texas Co.*, 366 NLRB No. 172, slip op. at 1 fn. 1 (2018).

A. The Respondent does not dispute:

(1) The consultants directed managers to walk around the building, engage in physical observation, and talk to employees to know their issues and concerns and report those back in the afternoon meetings.

(2) The consultants asked managers to provide feedback on how employees responded to the management handouts, and their impressions regarding employees' perspectives on the Union. Peraino and Weir had conversations about which employees appeared to be pro- or antiunion.

(3) The consultants held meetings with individual employees categorized as having "soft" or "hard" support for the Union, based on managers' assessments and the employee's body language.

Very significantly, GC Exh. 11 shows that managers were instructed to report back what they heard the Union was telling employees and whether the Union was approaching employees in the cafeteria or had a meeting over the weekend. The only way managers would have been able to learn this conduct would have been by questioning employees or surveilling them.

(4) Management, including Weir, department heads, and UMs came in on their off time and walked through the facility, visiting various units, talking to employees about their concerns, and offering to assist them in their work. Employees must have been quite surprised to see Weir, the facility's highest-ranking official, show up at their work areas and offer to help them with manual tasks when there is no evidence that he had ever previously done so.

B. Leonard's Testimony

Prior to late October 2019, no department heads or UMs had ever come to Leonard's unit, aside from the unit's UM, and offered to help with work. Moreover, on a daily basis, department heads stood by the time clock when Leonard arrived at punch in. On November 12, Peraino told Leonard that they had four statements of her harassing the housekeepers about union activity, and Director Walters stated that they had her on video.

C. Golden's Testimony

At the November 4 meeting, Peraino requested managers come in on their off shifts and monitor the staff or ask if they needed any assistance, to look for any "suspicious activities," including whether employees were gathering in groups, stopped speaking when managers walked by, or were engaged in non-job-related activities. Peraino or Camerota also brought up union meetings at Angela's Pizza and suggested that managers go there, overhear what employees were saying, and report back what they heard. After the November 4 meeting, Camerota told Golden that, in future meetings, she should report back employees' body language, eye contact while she talked to them, whether they crumpled up the consultants' literature, and if they spoke to other employees after she gave them the literature. The week of November 11, Carhart told Golden that the Company was trying to figure out who was for the Union and who was not.

D. Conclusions

Based on above, I conclude that from on about November 4, the Respondent engaged in unlawful surveillance and gave the impression of surveillance in violation of Section 8(a)(1). Further, because the supervisors carried out the instructions to commit unlawful surveillance, the Respondent further violated Section 8(a)(1) by issuing those instructions. See *Resistance Technology, Inc.*, 280 NLRB 1004, 1006 fn. 5 (1986); see also *Blankenship & Associates*, 290 NLRB 557, 558 fn. 3 (1988).

I dismiss paragraph 6(d) as it relates to instructing supervisors and agents to interrogate employees about their support for the Union. Even according to Golden, the thrust of the consultants' directives was to ascertain employees' union sympathies on the basis of observations, not by direct interrogation, and her testimony on their instructions regarding direct questioning of employees was confusing.

(2) Threats Regarding Nursing Licenses

Threatening an employee with loss of his or her nursing license for engaging in protected activity violates Section 8(a)(1). *Loyalhanna Health Care Associates*, 352 NLRB 863 (2007); *Indian Hills Care Center*, 321 NLRB 144 (1996).

At the November 12 meeting, above, Peraino told Leonard that the Union could not protect her nursing license. Peraino first stated that Leonard could participate in union activity but not on corporate time, and the housekeeping department might have been operated by a contractor. Nevertheless, I need not address the law on solicitation/distribution on worktime because I find highly suspicious the Respondent's refusal to provide the alleged statements and video to Leonard (and its failure to produce them at trial). I draw the inference that the purpose of Peraino's statement was to discourage Leonard from engaging in legitimate union activity and that she reasonably could have construed it as an implied threat that the Respondent would retaliate against her for engaging in protected union activity not limited to the housekeeping department. I therefore find this a violation.

Weir told Todd at their November 19 meeting that her treatment of patients could rise to the level of being reportable to the DOH. This was an indirect threat that her nursing license could be jeopardized. However, Weir said nothing, expressly or impliedly, tying in his statement with any union activity on Todd's part; rather, it related to alleged malfeasance. The statement was therefore not coercive, and I dismiss this allega-

tion.

(3) Freeze on Wage Increases

The respondent had a history of granting employees across-the-board wage increases. The December 19 posting stated that as a result of the Union's filing of unfair labor practice charges, everything was frozen. It is long settled that an employer may not blame a union for causing a wage freeze. *J. & G. Wall Baking Co.*, 272 NLRB 1008, 1012 (1984). I therefore conclude that the posting violated Section 8(a)(1).

(4) Other Alleged Violations of Section 8(a)(1)

Whether certain statements made to Golden and Endy could constitute violations depends on whether they were supervisors within the meaning of Section 8(a)(1), or employees

Todd's Suspension and Discharge

In cases where the issue is the motive behind an employer's action against an employee (was it legitimate or based on animus on account of the employee's union or protected concerted activities?), the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); see *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1 (2020); *Auto Nations, Inc.*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015).

Under *Wright Line,* the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. *Wright Line*, above at 1089. The General Counsel can meet this burden by establishing (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the employer's part. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

In *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5–8 (2019), the Board clarified the animus element of this test, explaining that the General Counsel "does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer's animus or hostility toward union or other protected activity." Id., slip op. at 7 (emphasis in original). "Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Id., slip op. at 8.

Once the General Counsel makes out a prima facie case, the burden shifts to the respondent to show that the same action would have taken place even in the absence of the protected activity. *Wright Line*, above at 1089; *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 (2018); *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007). Where the General Counsel has made a strong showing of discriminatory motivation, the employer's defense burden is substantial. *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011); *East End Bus Lines*, ibid.

Here, Todd talked to coworkers, attended union meetings at various locations, and handed out union flyers and authorization cards from June until her discharge in November. Weir, DON Carchidi, and UMs Collenton and Pope knew of her union activities and support.

As recognized in *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 1 (2019), "The Board may infer from the pretextual nature of an employer's proffered justification that the employer acted out of union **animus**, 'at least where . . . the surrounding facts tend to reinforce that inference." (quoting *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966) (emphasis in *Electrolux*).

Todd was an LPN for the Respondent for approximately 12 years prior to her discharge. In Todd's last performance review—on June 5, approximately 5 months before she was suspended and discharged—Pope rated her as "exceptional" in five categories; "needs improvement" in three, none related to misconduct toward neighbors or improper administration of medications; and "unsatisfactory" in none. Pope said nothing negative whatsoever about Todd's interactions with residents or her administering medications.

I simply cannot imagine that the Respondent would have kept Todd employed for 12 years had her conduct been as egregious as the Respondent has now claimed. She had no prior disciplines, and it is inconceivable that her performance so drastically deteriorated between June 5 and November 13 that she became properly subject to discharge.

Thus, the timing of Todd's suspension and discharge, after 12 years as an employee and within several months of her union activity, infers animus against her for that activity. See, e.g. *Mondelez Global LLC*, 369 NLRB No. 46, slip op. at 2 (2020) (proximity of a "few months"); *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 10–11, 29 (2019). With further regard to timing, the Respondent's allegedly sudden discovery of serious medication errors on her part only after she was suspended on November 13 seems far too coincidental when there is no evidence that she was ever disciplined for such in the previous 12 years. I note that Todd was never afforded an opportunity to respond to these allegations and that medication errors are nowhere mentioned in the Weir's termination summary.

Moreover, the Respondent's disparate treatment of Todd also raises the inference of animus toward her. See, e.g., *Mondelez-Global*, above at 4; *La Gloria Oil & Gas Co.* 337 NLRB 1120, 1124 (2002), affd. 71 Fed. App. 441 (5th Cir. 2003); *Southwire v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987) (absence of evidence employer discharged any other employee for similar violation). Here, no other staff members against whom neighbors complained in the social worker interviews were disciplined, and the Respondent has never discharged an LPN for derelictions in administering medication, giving them only verbal warnings in the vast majority of cases.

The above evidence supports an inference that misconduct toward neighbors and/or medication errors were not the real reasons Todd was suspended and discharged. See, e.g., *Mondelez Global,* above at 2.

Therefore, the General Counsel has established a prima facie case. I further conclude from the above evidence that the Respondent has failed to rebut this prima facie case. It is noteworthy that Legal Liaison Cole testified that she considered Todd's alleged abuse of patients "horrible" and that state law required either Weir or Carchidi to report to the DOH any suspected patient abuse. Weir conceded that if conduct rose to the level of abuse, he was required to report it to DOH. Yet, no report was made. I must believe that management realized that any conduct on Todd's part was not serious enough to report—undermining the Respondent's defense. The alternative is that they knowingly violated state law. In this regard, Weir explained that he did not report Todd because she was terminated and posed no further risk to the Respondent's residents (thus failing to alert the DOH that she posed a risk of committing further patient abuse at other facilities). I highly doubt that the DOH would accept this rationale.

In sum, the Respondent initiated complaints against Todd from staff and neighbors and then conducted a sham investigation with the preconceived goal of finding faults with her performance to justify her discharge.

Accordingly, I conclude that the Respondent's suspension and discharge of Todd violated Section 8(a)(3) and (1) of the Act.

Supervisory Status of Golden and Endy

A. Legal Framework

Section 2(11) defines "supervisor" as any individual having the 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 types of supervisory authority are listed in the disjunctive, and authority with regard to any one suffices to confer supervisory authority. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001); *Queen Mary*, 317 NLRB 1303, 1303 (1995), enfd. sub nom. *NLRB v. RMS Foundation, Inc.*, 113 F.3d 1242 (9th Cir. 1997); *NLRB v. Quinnipac College*, 256 F.3d 68, 74 (2001). Possession of supervisory authority is enough even if not exercised. *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 fn. 8 (2001); *Mid Allegheny Corp.*, 233 NLRB 1463, 1464 (1977).

To be classified a supervisor, an individual must use independent judgement in such a way as to affect employees' terms and conditions of employment. *Oakwood Healthcare*, 348 NLRB 686, 688 (2006); *Children's Farm Home,* 324 NLRB 61 (1997). "Independent judgement" will not be found where a result "is dictated or controlled by detailed instructions . . . ." *Oakwood Healthcare*, ibid; see also *Busco Tug and Barge, Inc.*, 359 NLRB 486, 490 (2012). Likewise, "independent judgement" does not include recommendations to a decision maker who conducts independent investigations of the events and fails to follow the recommendations. *Children's Farm Home,* 324 NLRB 61 (1997). Authority exercised on a rare, isolated, and irregular basis will not confer supervisory status. *Offshore Shipbuilding*, 274 NLRB 539, 555 (1985).

In *Kentucky River*, above at 711–712, the Court upheld the Board's rule that the burden of establishing supervisory status lies with the party asserting it. The party must establish such status by a preponderance of the evidence. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2002); *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

The "Board has exercised caution 'not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect." *Oakwood Healthcare, Inc.*, above at 688. Thus, the Act protects "straw bosses, lead men, and set up men" even though they perform "minor supervisory duties." Ibid, quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280–281(1974); see also *General Security Services Corp.*, 326 NLRB 312, 312 (1998).

Statutory status is not proven where the record evidence "is in conflict or otherwise inconclusive." *Republican Co.*, 361 NLRB 93, 97 (2014), citing *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *Golden Crest Healthcare Center*, 348 NLRB 727,731 (2006).

Absent evidence that an individual possesses any one of the statutory indicia, the Board looks to secondary indicia to determine supervisory status; however, secondary indicia are insufficient by themselves to establish supervisory authority. *Veolia Transportation Services, Inc.*, 363 NLRB 1879, 1879 (2016); *Sam's Club*, 349 NLRB 1007, 1014 (2007); *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

B. Golden

As the UM or nursing manager of the locked NBI unit, Golden was responsible for overseeing the nursing staff to ensure that neighbors received the intensive medical attention and care their severe brain injuries required. She also oversaw employees from other departments who came to the unit to service the neighbors. There is no evidence that the DON, ADONs, or nursing supervisor regularly came onto the unit or ever engaged in direct supervision of any of its staff members. With the exception of one department head or supervisor, who had an office in NBI, none of the other department directors maintained any degree of continuous presence there but rather visited only sporadically. Thus, Golden effectively oversaw their employees the entire work period and had the sole responsibility for detecting problems in their employees' performance and bringing them to the department heads. In sum, the nature of her position inherently required her to use her ongoing judgment in directing staff, both nursing and those from other departments.

In this regard, Golden had the authority as UM to issue written disciplines to the nursing staff, up to the written warning level, even if she never exercised that authority. As the Board has stated, "'[s]tatutory supervisory authority is not lost simply because it is infrequently exercised . . . . '" *Matheson Fast Freight*, 297 NLRB 63, 71 (1989), quoting *Jack Holland & Son,* 237 NLRB 263, 265 (1978); see also *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Kern Council Services*, 259 NLRB 817, 818 (1981).

The authority to discipline is a separate indicia from the authority to responsibly direct, but they are interrelated when, as

here, Golden was the sole nursing supervisor on the unit for the entire shift. There is no evidence the DON, ADONs, or nursing supervisor ever initiated disciplines of the nursing staff, nor did any supervisors report to Golden. Accordingly, she was the only person on the unit charged with the responsibility of discipling employees for shortcomings in their performance. Therefore, that authority to discipline must necessarily have been based on her authority to manage or direct them.

If Golden lacked the authority to responsibly direct employee, then no supervisor maintained an ongoing presence and authority over staff who worked in NBI—a locked unit having patients in the greatest need of continuous medical and other care, and the only unit for which state law requires a specific policy because it is a specialized program for residents requiring behavior interventions. It is unthinkable that no supervisor would have been physically present on the unit and in charge of how employees carried out their duties. Cf. *Matheson Fast Freight*, 297 NLRB 63, 72 (1989) (responsible direction found when supervisor was solely in charge of an operation that involved important safety measures requiring the extensive exercise of independent judgement).

Accordingly, I find that Golden possessed at least two indicia of supervisory authority: to responsibly direct and to discipline employees.

As secondary indicia, I also consider Golden's job title and job description, her higher pay, her attendance at management meetings, the Respondent's holding her out as a supervisor, her evaluating employees, and the high employee-to-supervisor ratio if UMs are not supervisors. See *Veolia Transportation Services,* above at 12; *Sheraton Hotel*, 350 NLRB 1114, 1118 (2007); *Sam's Club,* above at 1014; *Volair Contactors, Inc.*, 341 NLRB 673, 673 fn. 8 (2004); *Williamette Industries, Inc.*, 336 NLRB 743, 743 (2001); *Juniper Industries*, 311 NLRB 109, 110 (1993); *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991).

Based on the above, I conclude that Golden was a statutory supervisor and agent of the Respondent within the meaning of Section 2(11) of the Act.

Since I have concluded that Golden was a statutory supervisor, any statements Camerota made to her on October 28 and Carhart made to her on about November 18 were not made to an employee within the meaning of the Act. I therefore dismiss these allegations.

C. Endy

Endy played no role in hiring; deciding which employees would be scheduled to work a shift; transferring employees from shift to shift; preparing evaluations; or granting promotions, vacation requests, bonuses or wage increases. The indicia that must be evaluated relate to assignment, direction, and discipline.

(1) Assignment of Work

The analysis here is whether Endy's role in assignment was of a routine or clerical nature or required the use of independent judgment. To exercise "independent judgment" in making assignments and directing employees, an individual must act or effectively recommend action "free of the control of others," using a degree of discretion rising above "the merely routine or clerical." *Oakwood Healthcare, Inc.*, above at 692–693; see also *Brusco Tug and Barge, Inc.*, 359 NLRB 486, 490 (2012). Determining what rises to the level of 2(11) authority can be difficult. As the Court recognized in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001), "[T]he statutory term 'independent judgment' is ambiguous with respect to the degree of discretion required for supervisory status. . . . Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding' of supervisory status under the Act." (citations omitted).

At the beginning of the shift, Endy or Cruz assigned scheduled staff and themselves to the various posts. If neither was working, the nursing supervisor or a CSS with seniority made the assignments. DeAbreu determined which employees would work a particular shift, and CSS supervisors had no authority to deviate from his decisions. They decided the appropriate posts for particular staff members, whenever possible placing them in positions in which they were most comfortable or proficient. However, all CSS staff were capable of performing all posts, and none of them had any special training or education that made them uniquely qualified for any particular assignment. Endy and Cruz both took into account rotation of more physically demanding assignments and particularly difficult neighbors, most of whom were in the facility for years. During the shift, they reassigned staff members as the need arose, based on who was available. In sum, none of these assignments required independent judgment because they were routine in nature. See *Mercy General Health Partners Amicare Home Care,* 2017 W 5034114 (2017) (assignments to home healthcare aides and LPN's were routine and not based on significant training, education, or particular expertise); *Azusa Ranch Market*, 321 NLRB 811, 811 (1996).

The Respondent cites (R. Br. 37) *Oakwood Healthcare*, above at 689, wherein the Board stated that in the health care setting, "assign" encompasses the responsibility to assign nurses and aides to particular patients, and that decisions affecting place, time or overall tasks can be a supervisory function, including "plum or bum" assignments. That case is distinguishable. There, the assignments were on a regular basis; here, they were made each night and staff were rotated so that employees shared the difficult tasks or patients. Moreover, all of the employees were able to perform all functions and service all neighbors, Further, unlike the situation in *Oakwood Healthcare*, nothing suggests that the assignments Endy or Cruz made had any bearing on employees' opportunities to be considered for future promotions or rewards.

Accordingly, I find that Endy's assignment of work was of a routine nature and did not entail the level of discretion rising to "independent judgment."

"Assignment" incudes appointing an employee to an overtime period. *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 889 (2014). Here, DeAbreu advised the CSS supervisors which employees had worked too much overtime and should not be asked to stay over. If Endy and Cruz found themselves needing additional staffing, they decided which other employees to ask to stay. However, because they could only ask but

not require employees to work overtime, this did not establish supervisory authority. *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2156 (2011); *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006).

(2) Direction of Work

The CSS supervisors regularly checked on the performance of staff who were doing CVOs and 15-minute checks and made certain that staff followed policies regarding breaks and filling out paperwork. Significantly, the night nursing supervisor was the highest-ranking official on site, and DeAbreu was normally available and ready to come in on his off hours if Endy or Cruz needed him.

In carrying out these duties, Cruz and Endy clearly acted in the interests of the Respondent and not solely for their own convenience. See *Pepsi-Cola Co.*, 327 NLRB 1062, 1062 (1999). However, DeAbreu never told Endy he could suffer any consequences for derelictions on the part of his staff. DeAbreu did verbally counsel Cruz concerning the conduct of CSS employees, but there is no specific evidence that these were reduced to writing and maintained, or that Cruz suffered any actual or potential adverse consequences as a result, either pecuniary or otherwise. Accordingly, the "responsible" requirement under Section 2(11) of the Act is lacking. See *Springfield Terrace*, 355 NLRB 937 (2010); *Golden Crest Healthcare*, above at 731; *Oakwood Healthcare,* above at 691–692; *NLRB v. Saint Mary Home*, 358 Fed.Appx. 255, 255 (2nd Cir. 2009).

I therefore find that Endy did not responsibly direct employees within the meaning of Section 2(11).

(3) Discipline

The record is unclear how much independent authority Endy and Cruz had to issue disciplines beyond merely following DeAbreu's directives and transmitting write-ups to him concerning attendance and employees sleeping on the job. DeAbreu's testimony on disciplines was very conclusionary and lacking in specifics, and Cruz was equivocal on how often he disapproves her recommended disciplines. I note her testimony indicated that disciplinary reports stay in employees' files whether or not the discipline is actually issued. However, the Respondent produced no write-ups Cruz prepared or evidence on their ultimate disposition. None of the disciplinary reports contained in R. Exh. 18 were over the level of verbal warnings.

According to Cruz, DeAbreu had the final say on all disciplines that she proposed. The mere factual reporting of oral reprimands and the issuing of written warnings that do not automatically affect job status or tenure do not constitute supervisory authority. *Ohio Passavant Health Center*, 284 NLRB 887, 889 (1987). The Respondent has not shown that the warnings CSS supervisors issued "automatically affect[ed] job status or tenure" of employees. *Ohio Masonic Home*, 295 NLRB 390, 393–394 (1989), quoted in *The Republic Co.*, 361 NLRB 93, 99 (2014).

As stated earlier, the burden of establishing supervisory status lies with the party asserting it, and the Board is cautious not to construe supervisory status too broadly and exclude those performing "minor supervisory duties." Moreover, statutory status is not proven where the record evidence is inconclusive.

I therefore find that the Respondent has failed to meet its burden of showing Endy possessed the independent authority to issue discipline within the meaning of Section 2(11).

(4) Conclusion

Endy exercised no independent judgment in assignment, direction, or discipline and was not a statutory supervisor within the meaning of Section 2(11).[8]

November 11 Meeting

A. 8(a)(1) Violations

Inasmuch I have found Endy was not a statutory supervisor, I find inapposite cases cited by the Respondent (R. Br. 41) for the proposition that any questions he was asked on November 11 were permissible because he was a supervisor. Furthermore, the Respondent's mistaken belief that he was a supervisor does not afford the Respondent a defense. *Orr Iron, Inc.*, 207 NLRB 863 (1973), enfd. 508 F.2d 1305 (7th Cir. 1975); see also *Unifirst Corp.*, 335 NLRB 706 (2001).

At Endy's meeting with Peraino and DeAbreu, Peraino asked Endy if he knew who else was handing out authorization cards and if he knew who was signing them, thereby interrogating him about the union activities of other employees.

An employer's questioning of an employee is coercive if "under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House,* 269 NLRB 1176, 1177–1179 (1984), affd. sub nom.. 760 F.2d 1006 (9th Cir. 1985). That test was met here, where Endy was called into a meeting in the administrative conference room with his supervisor, accused of illegal activity, and threatened with a lawsuit.

I therefore conclude that the Respondent unlawfully interrogated Endy about the union activities of other employees and therefore violated Section 8(a)(1). See *Advancepierre Foods, Inc.*, 366 NLRB No. 133, slip. op. 1 fn. 6 (2018); *Robert Orr/Sysco Food Services, LLC*, 343 NLRB 1183 (2004).

Threatening an employee with a lawsuit for engaging in protected activity when there is no anticipation of any actual lawsuit is coercive under Section 7 of the Act. *United States Postal Service*, 351 NLRB 205 (2007). There is no evidence that the Respondent ever took any steps to take any legal action against Endy for anything.

I therefore conclude that Peraino's threat that the Company would sue Endy also violated Section 8(a)(1).

Finally, Peraino also asked Endy why he wanted a union. As with solicitation, this is not specifically alleged in the complaint but is closely related to existing allegations and was fully and fairly litigated. An employer's questioning an open and active union supporter about his or her union sentiments is unlawful if accompanied by threats or promises. *Rossmore House,* above at 1176, 1177. Here, Peraino started the conversation by threatening Endy with a lawsuit. Therefore, this question also violated Section 8(a)(1). I need not address whether other

[8] In light of this conclusion, I need not address arguments in the Union's brief (U. Br. 26–28) that Endy was a relief supervisor who did not spend a regular and substantial portion of his worktime performing supervisory functions.

statements of Peraino also constituted threats.

B. Suspension and Discharge

Under a *Wright Line* analysis, the General Counsel has established a prima facie case. Endy engaged in union activity, which was known to the Respondent. Again, the Respondent cannot defend on the ground that it had a good faith belief he was a statutory supervisor. The Respondent's animus toward Endy for his union activity is shown by Peraino's threat the Company would sue him, Peraino's interrogation regarding Endy's and other employees' union activities or sentiments, and Peraino's bellicose language (described hereinafter).

The Respondent contends (R. Br. 44) that Endy was discharged only after his outburst" at the meeting, when he intentionally damaged property and was insubordinate. This contention is totally undermined by the emails between Peraino, Camerota, and Rinn showing that the Respondent made the decision to discharge Endy even before the meeting took place.

I now turn to the second prong of *Wright Line* to determine whether the Respondent has rebutted the General Counsel's prima facie case.

Although the above emails stated other concerns with Endy (wearing a tee-shirt and listening on headphones to his cell phone), it is uncontroverted that those subjects were not mentioned during the meeting and were not included in the Respondent's documents as reasons for his termination. Endy had never received any disciplines for his attire or use of his headphones. I find, therefore, that the sole reason for Endy's suspension was his union activity. The Respondent conducted no further investigation after the suspension, and there is no doubt that his discharge was a foregone conclusion. Accordingly, his de facto date of discharge was November 11.

The pivotal question is whether Endy's conduct after DeAbreu told him that he was suspended was a valid reason to discharge him regardless of his union activity and the prior decision to terminate him.

I have discredited the testimony of Peraino and DeAbreu that he threw his badge at them; at most he threw it on the table, hardly amounting to significant misconduct.

The sole remaining misconduct at issue concerns Endy's slamming the door and causing a small dent as he left the room. This was not a workplace setting, and Endy's conduct at issue was not protected activity. Therefore, cases addressing "opprobrious workplace conduct" are not directly applicable.

The Board has "long recognized that an employer cannot provoke an employee to the point where he commits an indiscretion and then rely on that conduct to terminate his employment." *Key Food*, 336 NLRB 111, 113 (2001); see also *NLRB v. M & B Headware Co.*, 349 F.2d 170, 174 (4th Cir. 1965). In *Key Food*, ibid, the employee touched the supervisor on the shoulder following the supervisor's abusive tirade. The Board found such conduct was not "so unreasonable in relation to the Respondent's provocation as to justify his discharge." Ibid.

I find that from the very start of the meeting, Peraino was accusatory, belligerent, and threatening, as well as made unlawfully coercive statements. He unlawfully stated that Endy's union activity was illegal and that the corporation was going to sue him. When Endy started to answer a question, Peraino told him, "Shut the fuck up." When Peraino unlawfully asked why Endy wanted a union, Endy responded that he was trying to make his job better, to which Peraino responded that if he did not like the job the way it was, why didn't he "fucking" leave. After Endy refused to name others who were handing out or signing authorization cards, DeAbreu told Endy that he was suspended pending investigation.

Although I do not condone Endy's slamming the door with force, I find that a reasonable person in his shoes would have been very upset by what had just taken place and that he was provoked into committing that action. See the cases cited above. I take into account that the dent in wall did not constitute major damage or interfere in any way with the Respondent's ability to run its operation. Moreover, two other designated supervisors who engaged in misconduct were suspended and demoted but not terminated: one for misconduct toward a neighbor; the other for "a verbal explosion and cursing" and "slam[ing] out of a meeting" and continuing her tirade in the cafeteria. In this regard, Carchidi testified that the latter was not terminated because her outbursts occurred in nonpatient areas—as was the administrative conference room.

I therefore conclude that the Respondent has failed to rebut the General Counsel's prima facie case and that Endy's suspension and discharge violated Section 8(a)(3) and (1) of the Act.

Golden's Suspension and Discharge

Inasmuch as Golden was a statutory supervisor, I dismiss the allegation that Golden was suspended on October 28 because the Respondent believed that she supported the Union.

Although supervisors are not covered by the protections of the Act, the termination of a supervisor violates Section 8(a)(1) in limited circumstances, including when it is based on a refusal to commit an unfair labor practice. *Texas Dental Assn.*, 354 NLRB 398 (2009), citing *Parker-Robb Chevrolet*, 262 NLRB 402 (1982) enfd. sub nom. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983); see also *Howard Johnson Motor Lodge*, 261 NLRB 866 (1982), enfd. 702 F.2d 1 (1st Cir. 1983). As the Board stated in *Parker-Robb* (at 404), the discharge of supervisors for their refusal to commit unfair labor practices interferes with the right of employees to exercise their Section 7 rights.

The first question is whether the Respondent directed Golden to commit unfair labor practices; the second is whether she refused to commit them; and the third is whether that refusal led to her discharge and the Respondent's proffered reasons were pretextual.

I have concluded that Golden, along with directors and other UMs, were asked to unlawfully surveil employees to ascertain their union activities and sympathies.

After a consultants' afternoon meeting the week of November 11, Golden stated that employees were afraid to come inside the building and talk and that an LPN felt it was a witch hunt and bullying. When Peraino suggested that the LPN was for the Union, Golden replied that was ridiculous. Golden also stated that people (directors or UMs) who did not belong on the units were coming and talking to staff about the Union when they did not need to be there. After the meeting, when Golden met with Carhart and Carchidi, Golden told them that it was a

witch hunt and ridiculous, people they had for the Union were not for the Union, and there was hostility in the building. She also told them that she would not be willing to come in on her time off to monitor the staff or go to other units to monitor the staff on her on time in order to prove she was not a union organizer or leader.

Significantly, Weir testified in connection with Golden's discharge that "[T]here was a frustration that she continued to do the same things that she had been educated not to do; not learning how to be a manager and to take those kind of directions regarding what we are able and could be . . . doing." As I stated, the record reflects no conduct to which he could have been referring other than the consultants' directives.

Accordingly, I conclude that Golden's objections to the Respondent's unlawful surveillance amount to a refusal to commit unfair labor practices.

The final question is whether that refusal resulted in her discharge, or the Respondent had a bona fide basis. Although not technically applicable, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) is instructive. I set out above the *Wright Line* analytical framework.

Clearly, Golden's refusal to carry out the consultants' directives regarding (unlawful) surveillance played a role in her discharge. The next issue is whether the Respondent's proffered defense—Golden failed to make the transition from a unit nurse to a UM—was a pretext.

The answer is yes. The Respondent's witnesses' efforts to denigrate Golden's performance as a UM were completely unconvincing. The following, in particular, support my conclusion:

> (1) When Golden was called back from suspension on October 31, Weir stated that he was glad she was back, she had potential, and she was trying to become a better supervisor; further, that she was an integral part of the facility, the NBI staff was saying good things about her; and she was doing a really good job.

This totally refutes Weir's testimony that he observed Golden "struggle" as a UM and that he received "a lot" of complaints from staff regarding how she was managing NBI, as well as the statement that he made in her file that she was terminated for her inability to transition to her management role and for creating conflict between staff and management. Nothing in the record supports a finding that her conduct drastically changed between October 31, when he lauded her performance, and November 20.

(2) Weir's testimony shows that he did not initiate Golden's discharge, clearly suggesting it was motivated by the consultants.

(3) DON Carchidi had no involvement in the decision to discharge Golden even though she was the highest-ranking official in the nursing department.

(4) Golden received no disciplines for her performance as UM.

Moreover, the Respondent has demoted to staff positions, but not discharged, supervisors who were found to have engaged in misconduct.

I therefore conclude that the Respondent discharged Golden because of her refusal to commit unfair labor practices and thereby violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

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

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

3. By discharging Tara Golden and suspending and discharging Josh Endy and Cathy Todd, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act:

> (a) Surveilled employees and gave the impression of surveillance of their union activities.
> (b) Instructed supervisors to engage in unlawful surveillance.
> (c) Threatened employees that their nursing licenses could be jeopardized because they supported the Union.
> (d) Threatened employees with lawsuits for their engaging in union activities.
> (e) Interrogated employees about the union activities of other employees.
> (f) Interrogated employees about their union sentiments.
> (g) Told employees that they could not get their annual wage increase because the Union had filed unfair labor practice charges.

5. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act:

> (a) Discharged Tara Golden.
> (b) Suspended and discharged Josh Endy.
> (c) Suspended and discharged Cathy Todd.

REMEDY

Because I have 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 Josh Endy, Tara Golden, and Cathy Todd, it must offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and to make them whole for any losses of earnings and other benefits suffered as a result of their discharges. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as pre-

scribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, the Respondent shall compensate Endy, Golden, and Todd for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. See *Advoserv of New Jersey, Inc.*, 363 NLRB 1324 (2016); *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). The Respondent shall compensate Endy, Golden, and Todd for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable next backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above. In addition to the backpay-allocation report, the Respondent shall file with the Regional Director copies of Endy's, Golden's and Todd's corresponding W-2 forms reflecting the backpay awards. *Cascades Containerboard Packing—Niagara*, 370 NLRB No. 76 (2021).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, NCRNC, LLC d/b/a Northeast Center for Rehabilitation and Brain Injury, Lake Katrine, NY, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging or otherwise discriminating against employees for engaging in union activities.

(b) Discharging or otherwise discriminating against supervisors for refusing to engage in unfair labor practices.

(c) Surveilling or giving employees the impression of surveillance of their

union activities.

(d) Instructing supervisors to engage in unlawful surveillance.

(e) Threatening employees with loss of their professional licenses or

lawsuits because of their activities on behalf of 1199SEIU United Healthcare Workers East (the Union).

(f) Interrogating employees about their union sympathies or the union activities of other employees.

(g) Telling employees that the Union is to blame for a freeze in their wages.

(h) 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) Within 14 days from the date of the Board's Order, offer Josh Endy, Tara Golden and Cathy Todd full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Golden and the unlawful suspensions and discharges of Endy and Todd, and within 3 days thereafter notify them in writing that this has been done and that the suspension and discharges will not be used against them in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Lake Katrine, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 3, 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. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If during the pendency of these proceedings, the Respondent has gone out of business or closed the Lake Katrina, New York facility, 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 November 4, 2019.

(f) 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.

Dated, Washington, D.C., April 21, 2021.

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.

[9] 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.

[10] 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."

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 suspend, discharge, or otherwise discriminate against any of you because you support and assist 1199SEIU United Healthcare Workers East (the Union) or any other labor organization or engage in protected activities, or to discourage other employees from engaging in those activities.

WE WILL NOT discharge or otherwise discriminate against supervisors who refuse to interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice

WE WILL NOT surveil you or give you the impression of surveillance of your union activities.

WE WILL NOT instruct our supervisors to surveil your union activities.

WE WILL NOT threaten you with loss of your professional licenses or with lawsuits because of your union activities.

WE WILL NOT Interrogate you about your union sentiments or the union activities of other employees.

WE WILL NOT tell you that the Union is to blame for a freeze in your wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL within 14 days from the date of the Board's Order, offer Josh Endy, Tara Golden, and Cathy Todd full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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

WE WILL remove from our files any reference to our unlawful discharge of Golden and our unlawful suspensions and discharges of Endy and Todd, and within 3 days thereafter notify them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

NCRNC, LLC D/B/A NORTHEAST CENTER FOR REHABILITATION AND BRAIN INJURY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-252090 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.